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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JERI EMMET LAIRD,

Petitioner,

vs.

SIDNEY G. BLACKER, as Administrator of the Estate of Samuel Z. Winnikoff; Barry J. Post,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Where a State's statute of limitations for legal malpractice states that the period shall be tolled until the plaintiff sustains "actual injury", is such a statute vague and overbroad so as to constitute a denial of due process of law under the Fourteenth Amendment to the United States Constitution when it is not known whether "actual injury", means "appreciable injury", or "irremediable injury"?

2. Where a State's statute of limitations for legal malpractice is interpreted by the highest court of the State to commence the time period for bringing suit at the time of apparent injury before it has been determined whether the injury is irremediable, but where the time period for suing other professionals commences on the date the injury becomes irremediable, does such a of statutory interpretation constitute unequal protection of the law in violation of the equal protection clause of the Fourteenth amendment to the United States Constitution?

3. Where a State's highest court gives retroactive effect to a ruling in a matter of first impression which changes existing law, and thereby vacates a television writer's $1.7 million judgment on the grounds thatshe did not file a case within one year of the dismissal of her case in the trial court, when existing law tolled the statute of limitations until the dismissal became final on appeal, is such retroactive application a denial of due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

4. Where a State's highest court overturns a television writers' $1.7 million judgment against her lawyers on the grounds that she did not sue them within one year from the date her case was dismissed in the trial court, before she knew whether the lawyers were actually negligent as determined by appellate review, does such an interpretation of the State's statute of limitations for legal malpractice constitute a taking of property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution?

LIST OF ALL PARTIES
TO THE PROCEEDING
IN THE
CALIFORNIA SUPREME COURT

Petitioner, Jeri Emmet Laird, is the only party seeking review of this Judgment. The caption of the case reflects all parties to the proceeding.

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OPINION BELOW

The opinion of the Supreme Court of California, affirming the judgment of the Court of Appeal of the State of California is reported at 2 Cal.4th 606 (1992), and is reproduced as Appendix A, infra, at A-2 to A-81.

The opinion of the California Court of Appeal reversing the $1.7 million judgment in favor of petitioner, and remanding with directions to enter judgment in favor of respondents, is reproduced as Appendix B, infra, at B-83 to B-145. No opinion was rendered by the Superior Court of the State of California for the County of Los Angeles.

The order denying rehearing in the Supreme Court of the State of California en banc is reproduced as Appendix C. infra, at C-146.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Supreme Court of the State of California was entered on May 7, 1992. A timely petition for a rehearing was filed by petitioner on May 22, 1992, and denied on July 16, 1992. This Petition for Certiorari is filed within 90 days of the date of said denial.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE AND STATE STATUTE SOUGHT TO BE HELD UNCONSTITUTIONAL:

The Constitutional provision involved in this case is the Fourteenth Amendment to the United States Constitution, section 1. This section of the Fourteenth Amendment states as follows: "Section 1 -

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The State statute sought to be held unconstitutional by this Court is California Code of Civil Procedure Section 340.6. This statute states as

follows: "Section 340.6 -

Action Against Attorney For Wrongful Act Or Omission, Other Than Fraud. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exists: (1) The plaintiff has not sustained actual injury; (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney except that this subdivision shall toll only the 4-year limitation; and (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action. (b) In an action based upon an instrument in writing, the effective date of which depends upon

> some act or event of the future, the period of limitations provided for by this section shall commence upon the occurrence of such act or events."

It is respectfully asserted by petitioner that California Code of Civ. Proc. section 340.6[1], which is the California statute of limitations for legal malpractice, is unconstitutionally vague and overbroad in its language stating that the period that shall be tolled during the time that the plaintiff has not sustained "actual injury"; that in its interpretation by the California Supreme Court to the effect that "actual injury" does not mean irremediable injury but only apparent or "appreciable" injury, constitutes a denial of equal protection of the law to victims of legal

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[1] All further references to section 340.6 refer to the California Code of Civil Procedure.

malpractice, since the State does not apply such an early running of the statute in cases involving negligence of other professionals; that requiring a plaintiff to sue her lawyer for legal malpractice when her case was dismissed in the trial court for failure to prosecute, before she has had an opportunity to test the trial court's ruling on appeal, and vacating petitioner's $1.7 million judgment against her lawyers by not tolling the statute of limitations while she was on appeal, constitutes an unconstitutional taking of property without due process of law; and that the retroactive application to the petitioner of the new definition of "actual injury" to mean "appreciable injury" and not "irremediable injury" constitutes a denial of due process of law.

The constitutional arguments based on denial of due process of law and denial of equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution were raised by petitioner in her petition for rehearing before the Supreme Court of the State of California, pp. 16-21. Considering the enormous element of surprise in this case, wherein an entire line of cases which petitioner justifiably relied upon were overthrown by the Supreme Court of the State of California, the Petitioner could not be required to exercise "perspicacious foresight of legal trends", to have anticipated the need earlier to raise constitutional arguments. People v. Martino (1985) 166 Cal.App.3d 777, 787.

CONCISE STATEMENT OF THE CASE:

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On March, 8, 1977, Petitioner, Jeri Emmet Laird, a television writer, sued Spelling-Goldberg Productions for stealing her story ideas and characters and developing them into the television series "Family". Petitioner retained the law firm of Berg & Spire to prosecute her lawsuit. This law firm served the complaint, but did nothing further on behalf of petitioner.

In the Summer of 1980, petitioner, retained Barry Post and the law offices of Samuel Z. Winnikoff.[2]

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[2] Respondent Sidney G. Blacker represents the estate of Samuel Winnikoff. Petitioner sued Blacker as administrator or Winnikoff's law firm.

On October 20, 1981, the trial court, pursuant to defendants' motion, dismissed the suit for lack of prosecution. Attorney Post told petitioner that "the court was in error as unfortunately sometimes happens". Post and Winnikoff demanded the sum of $4,000 to pursue an appeal. Petitioner did not have the funds. Post and Winnikoff withdrew as attorneys of record.[3]

On September 15, 1982, petitioner settled her claims against Spelling-Goldberg for $1,000 and dismissed the appeal.

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[3] There is a discrepancy between the opinion and the real facts. The Court of Appeal and the California Supreme Court stated that petitioner discharged Post and Winnikoff, substituted herself in propria persona and filed a notice of appeal. Petitioner Laird has always maintained that Post and Winnikoff abandoned her because she could not afford the $4,000 they demanded for the appeal. Attorney Post prepared and filed the notice of appeal in Laird's name and also paid the filing fee.

On May 17, 1983, 8 months after she dismissed her appeal, petitioner sued Berg & Spire and Barry Post for legal malpractice.[4]

On February of 1986, petitioner amended her complaint to add Winnikoff as an additional defendant.[5] Post and Winnikoff demurred, asserting that petitioner's cause of action accrued on October 20, 1981, when the underlying case against Spelling-Goldberg was dismissed regardless of petitioner's ensuing appeals. Respondents claimed

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[4] This was 19 months after her action against Spelling-Goldberg was dismissed, and 17 months after Post and Winnikoff left the case. It should be noted that section 340.6 (a)(2) tolls the statute of limitations as long as the attorney continues to represent the client regarding a specific subject matter in which the alleged wrongful act or omission occurred.

[5] Winnikoff had died. Respondent is the Estate of Winnikoff.

that the statute of limitations (section 340.6) started running on December 7, 1981, when petitioner "discharged" Post and Winnikoff. Petitioner successfully opposed the demurrers, asserting that her cause of action had not accrued until she dismissed her appeal on September 15, 1982. She argued that Post and Winnikoff had a continuing duty to her after her case had been dismissed. The trial court agreed with petitioner Laird.

Petitioner settled with Berg & Spire and went to trial against Post and Winnikoff. Respondents did not submit the issue of the statute of limitations to the jury. The jury returned a verdict in favor of petitioner Laird for approximately $1.7 million. Post and Winnikoff appealed.

In an admitted departure from prior law, the California Court of Appeal held

that the statute of limitations for a legal malpractice victim's cause of action starts to run on the date she loses in the trial court, not on the date her appeal is concluded and the purported error or omission of the lawyer is confirmed on appeal. Since the underlying action was dismissed for lack of prosecution on October 20, 1981, the California Court of Appeal held that the statute ran on October 20, 1982. Petitioner Laird did not file her lawsuit until seven months later, on May 18, 1983. The Court of Appeal reversed the judgment and remanded with directions to enter judgment in favor of respondents. That court held that under section 340.6, subdivision (a), petitioner sustained actual injury on October 20, 1981, when her case was dismissed and judgment was entered against her. Petitioner appealed

to the Supreme Court of the State of California, asking that court to hold that the limitations was tolled until petitioner's appeal of right was resolved. The California Supreme Court affirmed the Court of Appeal decision. Justice Mosk dissented, holding that petitioner Laird's malpractice action was timely since it was filed within one year of dismissing her appeal. Justice Mosk was of the view that section 340.6 tolls the limitations period for filing legal malpractice actions when, as here, a client takes an appeal of right from the underlying judgment and is awaiting its outcome.

REASONS FOR GRANTING THE WRIT

1. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.6, WHICH GOVERNS THE TIME IN WHICH AN ACTION FOR LEGAL MALPRACTICE MAY BE BROUGHT, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS WRITTEN, AND AS INTERPRETED BY THE STATE'S HIGHEST COURT CONSTITUTES A DENIAL OF DUE PROCESS OF LAW AND A DENIAL OF EQUAL PROTECTION OF THE LAW IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Section 340.6 is unconstitutionally vague and overbroad so as to constitute a denial of due process of law in violation of the Fourteen Amendment to the United States Constitution.

As noted in Justice Mosk's dissent, a statute that is clear on its face does not require a lengthy opinion to expound its meaning, "nor does it generate the varying interpretations seen in the case

law". (App. A-56.) The phrase "actual injury" in section 340.6 is not self-explanatory. The phrase is ambiguous and has led, as here, to litigation.

It must be acknowledged that "actual injury" is not self-defining. The phrase becomes important in California law because of the way section 340.6 is written. In California, unlike most other States, as far as an action for legal malpractice is concerned, the client must discover the malpractice, and second, even after the malpractice is discovered, the period is tolled until there is "actual injury". Thus, as discussed in the dissent, even after the error is discovered, section 340.6 allows the client to wait until the requisite injury is suffered. Therefore, it is inconsistent with this statutory scheme for the Supreme Court of California to

have analyzed "actual injury" by focusing on discovery of the cause of action.

The legislative history in California of section 340.6 neither discusses nor defines "actual injury", and as Justice Mosk states in his dissent, "the majority's 'clear' answer is nothing more than its own gratuitous construction of an ambiguous statute". (App. A-60.) Thus, section 340.6 does not provide, on its face or in its legislative history, a definition of "actual injury".

The case law interpreting "actual injury" as it applies to section 340.6 indicates the confusion that exists in California law on this crucial point, and underscores the necessity of this Court's granting certiorari and voiding a statute that is unconstitutionally vague and overbroad.

Prior to the enactment of section 340.6 in 1977, the statute of limitations for legal malpractice actions in California was governed by Code of Civil Procedure section 339, subdivision 1, which provided a 2-year limitations period for any action based on "a contract, obligation or liability not founded upon an instrument in writing...". Although section 339, subdivision 1, did not establish an accrual date for legal malpractice actions, courts generally adopted, as the date of accrual, the date on which the malpractice occurred. (Hays v. Ewing, (1886) 70 Cal. 127 [11 P. 602]. In 1969, the California Supreme Court in Heyer v. Flaig, 70 Cal.2d 223, established the first exception to the occurrence rule, holding that the statute of limitations does not commence against beneficiaries

of a negligently drawn will until the death of the testator. The cause of action for legal malpractice "did not accrue nor the statute of limitations commence to run until [the attorney's] negligence became irremediable." Id. at p. 230, (Emphasis added.)

The Legislature, in enacting Assembly Bill 298 which led to section 340.6, intended to "codify existing case law on the specific circumstances under which the basic one-year and the outer four-year limitations period are tolled," and to reduce the cost of malpractice insurance. (Sen. Comm. on Judiciary Report (May 17, 1977)).

The report identified Neel v. Magana, Olney, Levy, Cathcart & Gelfand (hereinafter Neel v. Magana) (1971) 6 Cal.3d 176, and Budd v. Nixen (1971) 6

Cal.3d 195, as "existing case law." Read together, these two cases rejected the "occurrence rule" in legal malpractice cases. Neel & Budd held that the statute of limitations for a legal malpractice cause of action in California does not accrue until the client suffers damage and discovers, or should discover the facts essential to her claim, whichever occurs later. (Budd v. Nixen, supra, 6 Cal.3d at p. 198; Neel v. Magana, supra 6 Cal.3d at p. 179.)

Thereafter, since the Legislature intended to codify prior law, the Court of Appeal reasonably construed the "actual damage" language of section 340.6 to mean damage which was irremediable. In other words, until Laird, the rule was that harm is "appreciable" only if and when it becomes "irremediable" [and]

"irremediable", by definition, means something which is impossible to remedy; something which is lost, or incorrigible." (Robinson v. McGinn, 195 Cal.App at p. 74.) In the context of litigation error, the "irremediable harm" rule was a useful shorthand device for saying that an injured client suffered actual harm on the date the reviewing court affirmed an adverse judgment or the time for an appeal expired. (Id. at p. 74; Southland Mechanical Constructors v. Nixen, supra, 119 Cal.App.3d at p. 433; logically, a victim of legal malpractice will not suffer actual harm if the appellate court reverses an adverse judgment.

The crux of petitioner's argument is that the words "actual damage" in section 340.6(a) mean those that are actually

determined as of the date she loses the appeal or abandons it. Put another way, damages are speculative until the Court of Appeal decides the appeal. If the Court of Appeal reverses the trial court judgment, the petitioner has actually lost nothing. (MFAC v. Distribution Corp., supra, 673 p.2d at P. 798 [damages "completely contingent" upon outcome of appeal].

But now we have the Laird Rule. The Laird court has stated that when the Legislature adopted section 340.6 in 1977, it implicitly rejected the term "irremediable damage" and codified the discovery rule of Neel v. Magana, and Budd v. Nixen. But the Laird court's reliance on dictum in Budd v. Nixen, which was based on an entirely different statute, is misplaced. As discussed in

the dissent, Budd declared that in general a litigant suffers actual damage on entry of an adverse judgment. The Laird court seeks to read into this generalization "an unbending rule equating actual injury with judgment." But in Budd, unlike the instant case, the client did not timely pursue his appeal of right. It is clear that actual injury and judgment may not be synonymous.

Thus, although the Laird court in California has now announced that the statute of limitations in a legal malpractice action is not tolled during the pendency of an appeal, the California Supreme Court has still not adequately defined the term "actual injury". It is respectfully submitted that it is impossible to do so. Does, "actual injury" mean any injury? Does it mean any inconvenience, any loss in court, any

expenditure that becomes necessary, no matter how minuscule? Does it mean <u>any</u> possible mistake the attorney makes which the client <u>suspects</u> might amount to malpractice, within the meaning of section 340.6? As the statute is presently written it is impossible to say. It remains unconstitutionally vague and overbroad, will continue to lead to confusion, unfairness, and an excess of litigation, and requires this Court's attention to strike it down as unconstitutionally vague and overbroad. The State of California must enact a more precise, constitutional statute of limitations for the bringing of legal malpractice actions.

B. A State statute that fixes the time of accrual of a cause of action for legal malpractice at the date of the first suspected error of a lawyer that causes adversity to a client, regardless of the lack of finality of the adversity, while requiring irremediable harm for the accrual of a cause of action for other professional negligence, constitutes a denial of equal protection of the law to plaintiffs in legal malpractice actions.

The new Laird Rule now requires legal malpractice plaintiffs such as petitioner Laird to file a malpractice suit while still awaiting the outcome of the underlying case, which ultimately may prove either that the attorney committed no malpractice, or that if he did, the error was harmless, or that damages were negligible.

This truncated statute of limitations in California applies, however, only to those who sue lawyers. Since the enactment of California Civil Code Section 1049 in 1872, reviewing

courts in California have consistently held that a second action which depends upon the outcome of the first cannot be prosecuted during the pendency of an appeal in the first case. When the Legislature in California intended a different result, it did not hesitate to say so. Government Code section 945.3 tolls the statute of limitations on government tort actions while related criminal actions are pending against the plaintiff. That section also provides:

> "for purposes of this section, charges pending before a Justice, Municipal, or Superior Court do not include appeals...." (Emphasis added.)

By such an exclusion, the Legislature expressly intended the term "pending" to include all proceedings leading to an appealable judgment, but excluding an

appeal. McAlpine v. Superior Court (1989) 209 Cal.3d 1, 6-7.

There is no such exclusion in section 340.6, or any other statutes of limitations found in the Code of Civil Procedure. By contrast, in virtually all situations, decisional authority in California holds that statutes of limitations either do not commence or are tolled until the resolution of the underlying case in the Court of Appeal or until the time in which to take an appeal expires. Petitioner Laird, and malpractice victims like her, are entitled to invoke the same rule.

Code of Civil Procedure Section 1049 states as follows:

> "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

Thus, for the last 120 years, California's appellate courts have always held that the appeal tolls the statute of limitations on the second action when that second action depends upon the outcome of the first; i.e. the first action cannot be prosecuted during the pendency of an appeal. In re Blythe, (1983) 99 Cal. 472, In Blythe a minor obtained a judgment that she was the child and heir of Thomas Blythe. While an appeal was pending, the child brought another action requesting a family allowance. The only evidence of her entitlement was the prior judgment which was on appeal. The Supreme Court of California reversed the order for a family allowance because there was no evidence to support it. (Id. at p. 474.)

The Court held:

> "A judgment, in order to be admissible in evidence for the purpose of proving a fact therein recited must be a final judgment in the cause, and if the action in which the judgment is rendered is still pending, necessarily the judgment is not final." (Id. at p. 475.)

The Blythe court further held:

> "[a]lthough a judgment may be final with reference to the court which pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal and liable to be reversed." (Id.)

The same principle was pronounced in 1918 in Chambers v. Farnham, 39 Cal.App 17; and also in Burns v. Massachusetts Bonding & Ins.Co. in 1944 62 Cal.App.2d 963.

In County of Santa Clara v. Hayes Co. (1954) 43 Cal.2d 615, a newspaper made errors in publishing a proposed

County Charter. The error went unnoticed until voters approved the charter. The County could have immediately instituted a damages action. Instead the County presented the charter to the Legislature hoping that the errors were insufficient to require validation of the charter. Although the Legislature approved the charter, it was judicially invalidated in a quo warranto proceeding. The County then sued the newspaper for damages; the newspaper raised the bar of the statute of limitations. The California Supreme Court held,

> "[T]he statute of limitations was tolled from the date the charter went into effect until the date it was finally determined to be invalid by a decision of this court." (Id. emphasis added.)

Again, the same principle was enunciated in Walker v. Pacific Indemnity

Co. (1960) 183 Cal.App.2d 513 and also in Elkins v. Derby (1974) 12 Cal.3d 410. Walker excluded attorney malpractice from its holding. Walker, supra at 518. In doing so, the Walker court relied on DeGarmo v. Luther T. Mayo, Inc. (1935) 4 Cal.App.2d 604, 606. DeGarmo and Walker were decided when the occurrence rule was still in effect for legal malpractice action. In Neel v. Magana, supra, 6 Cal.App.3d at p. 185, the California Supreme Court disapproved DeGarmo as an illustration of the "harsh" occurrence rule.

More recently, under analogous circumstances, a Court of Appeal held that California law precludes an action for malicious prosecution by a defendant against a losing plaintiff while an appeal is pending. (Gibbs v. Haight,

Dickson, Brown & Bonesteel (1986) 193 Cal.App.3d 716, 722. The statute of limitations for malicious prosecution actions is one year (California Code of Civil Procedure, section 340, subd. (3).) There is no language in section 340 which provides for tolling the statute pending resolution of an appeal. Nonetheless, the Gibb court held that a cause of action for malicious prosecution accrues on the date of the entry of judgment, runs from accrual until the date of filing the notice of appeal, and is then tolled until the conclusion of the appellate process, at which time it commences to run again. (Id. at p. 722.)

In Rare Coin Galleries, Inc. v. A-Mark Coin Co. (1988) 202 Cal.App.3d 330, the court refined the Gibb rule holding that recommencing the statute of

limitations with the issuance of a remittitur is the most workable rule. Because the remittitur does not issue until the time elapses for a petition for review in the Supreme Court, the possibility of a reversal of the underlying action is put to rest. (Id. at p. 336.) "'Finality is not achieved' until the mandate occurs." (Karody-Colyer Corp. v. General Motors Corp. (1989) 208 Cal.App.3d 1148, 1153.

Thus for more than a century, the courts of the State of California have required finality before an underlying case can be used as the basis of a second suit. Now, with the enunciation by the California Supreme Court of the Laird Rule, the lawyers of the State become a privileged hierarchy. If they are to be sued, they must be sued upon the mere

suspicion of an error which causes any "appreciable" adversity to the client, without the need of a determination that, indeed, negligence did occur and the client's adversity is final. Now, a plaintiff in a legal malpractice action in California, to protect her rights, is forced to conduct parallel litigation; she must protect her underlying case on appeal, while at the same time sue the lawyer before she knows whether in fact the lawyer fell below the standard of care.

Such an interpretation of section 340.6, clearly renders the statute unconstitutional as a denial of equal protection of the law to every plaintiff in a legal malpractice action in the State of California.

C. The California Supreme Court's retroactive application of the Laird Rule to petitioner constitutes a denial of due process of law.

The Laird matter is a case of first impression. The Laird decision is a complete departure from Heyer v. Flaig (1969) 70 Cal.2d 223, and a multitude of cases which emanated from the Courts of Appeal of the State of California following Heyer v. Flaig. All of these cases continue to bolster and define the concept of "actual damages" as meaning "irremediable" damages.[6]

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[6] Among the cases following the irremediable rule are: Bledstein v. Superior Court (1984) 162 Cal.App.3d 152, 170 ["appreciable harm"]; Day v. Rosenthal, 170 Cal.App.3d at p. 1164 ["appreciable and actual damage"]; Goebel v. Lauderdale (1989) 214 Cal.App.3d 1502, 1507 ["irremediable harm"]; McKeown v. First Interstate Bank (1987) 194 Cal.App.3d 1225, 1231 ["irremediable error"]; Johnson v. Haberman & Kassoy (1988) 201 Cal.App.3d 1468, 1474 ["irremediable" harm]; In re Easterbrook (1988) 200 Cal.App.3d 1541, 1544 ["appreciable and actual harm"].
See also: Bell v. Hummell (1982) 136 Cal.App.3d 1009, 1016 ["irremediable damage"]; Southland Mechanical

The California Supreme Court did not overrule Heyer v. Flaig in Budd v. Nixen (1971) 6 Cal.App.3d 195, or in Neel v. Magana (1971) 6 Cal.3d 176. Neither of these cases involved an appeal, so the California Supreme Court was not called upon, prior to Laird, to decide whether the statute of limitations is tolled during the appellate process. Petitioner, of course, did not raise the retroactivity issue in the Court of Appeal, because, having won in the trial court, she could not be expected to be clairvoyant, or to have had the

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Constructors Corp. v. Nixen, 119 Cal.App.3d at p. 3 ["irremediable" error]; McCann v. Weldon (1984) 153 Cal.App.3d 814, 824 ["actual injury equated with irremediable error"]; See also: 2 Mallen & Smith, Legal Malpractice (3d. Ed 1989) section 18.11, p. 106 ["A common approach (to establish date of damage) is to select the last possible date when the attorney's error becomes irremediable."].)

"perspicacious foresight," to predict that the Court of Appeal would announce a new rule, and argue that it should be applied only prospectively. ("Parties are not required to exercise perspicacious foresight of legal trends.") People v. Martino (1985) 166 Cal.App.3d 777, 787.

The considerations governing whether or not a ruling should be applied retroactively or only prospectively are: the extent of public reliance upon the former rule, and, on the other hand, the ability of the litigants to foresee a coming change of the law. (Peterson v. Superior Court (1982) 31 Cal.3d 147, 152-153. Considerations of fairness measure the reliance on prior standards by the parties or others affected, and the "ability to foresee the coming change in the law." (Id. at p. 153, quoting Neel v. Magana, supra, 6 Cal.3d at. p. 193.)

California law has long recognized the unfairness of penalizing a litigant for relying on clearly established law and for lacking the gift of prophecy in predicting an abrupt change in the law. In Parrot v. Furesz (1957) 153 Cal.App.2d 26, the California Court of Appeal analyzed the issue of whether the holding in a case striking down jury instructions on the doctrine of last clear chance should be applied retroactively. The appellate court held: "It would be manifestly unfair and a mockery of justice to deprive [plaintiff of a trial] because his counsel lacked the gift of prophecy and could not forsee [an instructional error]... which heretofore escaped the combined observation of several appellate courts and numerous able attorneys." (Id. at pp. 29-30.) The retroactive application of this new

procedural Laird Rule would reward a negligent attorney at the expense of his unfortunate client who is being punished for relying on the prior rule.

Federal law is replete with cases holding that retroactive application of a change in the law, when it works an obvious unfairness and a burdensome oppressiveness, becomes violative of the due process clause of the Fourteenth Amendment. In U.S. v. Newball 524 F.Supp. 715 (E.D. N.Y. 1981) The court held that the applications of a detailed statute may violate the notice requirement of due process when it is retroactively expanded by a surprising judicial construction particularly where the conduct construed to be prohibited cannot be deemed improper or immoral. In Newball, the phrase at issue was "vessel of the United States", and the case concerned a seizure

of foreign nationals who were members of a fishing boat seized by the Coast Guard. There, the district court held that the term "vessel of the United States" was detailed rather than vague and that there was no surprising judicial expansion of the term in that case. This is not the case in Laird, where the term "actual injury" was surprisingly contracted so as to mean no longer irremediable harm but to include even apparent or temporary adversity. Petitioner Jeri Laird had absolutely no notice whatsoever, when her case was dismissed in the trial court, that she had one year from that moment to sue her lawyer, regardless of the pendency of an appeal. Predicated on the entire body of California law that preceded Laird, petitioner had every right to assume that so long as she took

appropriate action in the Court of Appeal concerning the decision dismissing her case. The statute of limitations was tolled as to any possible malpractice action against her lawyer if the appeal failed.

It is in situations like this, when the retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow, that the limits of the due process clause are exceeded. Matter of U.S. Financial, Inc. (9th Cir. 1979) 594 F.2d 1275.

And it is clear that due process principles apply to retroactive application of a new interpretation of an old administrative regulation just as well as they apply the retroactive effect of a new regulation. Cheshire Hosp. v. New Hampshire-Vermont Hospitalization

Service, Inc. (1st Cir. 1982) 689 F.2d 1112. This principle of course applies as well to a judicial interpretation of a statute.

In comparing the public interest in a retroactive rule with those private interests that are overturned by it, a critical consideration is the extent to which a retroactive rule or interpretation adversely affects the reasonable expectations of concerned parties. (Id.) Here in Laird, the effect upon the petitioner's reasonable expectations when she appealed her dismissal below are disastrous. After surviving more than a decade in the judicial system, and after obtaining a verdict in a court of law in the amount of $1.7 million, she now sees the reward for her labors wiped away by a ruling she

could never have anticipated. Public interest in the Laird Rule is non-existent, unless trial lawyers are to be exalted above other defendants, and made more difficult to sue, despite their malefactions.

The due process clause of the Fourteenth Amendment does not make unconstitutional every law with retroactive effect. But it does make unconstitutional those retroactive effects which are so wholly unexpected and disruptive that harsh and oppressive consequences, such as those that befell Jeri Laird, follow such retroactive application. (Hazelwood Chronic & Convalescent Hospital v. Weinberger (9th Cir. 1976) 543 F.2d 703, vacated 97 S. Ct. 1595, 430 U.S. 952, 51 L.Ed.2d 801 on remand 556 F.2d 981)

It is also true that retroactive measures are subjected to a closer degree of scrutiny, when they are challenged as violative of due process, than are purely prospective measures. Chevron Chemical Co. v. Costle (U.S.D.C. Del. 1980) 499 F.Supp. 732, injunction denied 499 F.Supp. 745, affirmed 641 F.2d 104, certiorari denied 101 S.Ct. 3110, 452 U.S. 961, 69 L. Ed.2d 972.

To pass constitutional muster under the due process clause, a retroactive application of a new interpretation of a statute must survive a balancing test; the harsh and oppressive effects on the parties must be outweighed by the benefits to the public at large. The Laird Rule benefits no one but negligent lawyers. It will spawn duplicative litigation, undermine the attorney-client

relationship, and deprive litigants such as petitioner herein of their rights to a thorough adjudication in the appellate courts of the State.

The application by the California Supreme Court of the Laird Rule against Jeri Laird unalterably changes her life for the worse in violation of her rights under the due process of the Fourteenth Amendment to the United States Constitution.

D. When the highest court of a State vacates a plaintiff's $1.7 million judgment against her lawyers because she failed to sue them before she had a reasonable opportunity to ascertain their negligence, such a ruling constitutes a taking of property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

The Legislative record in California reveals that "Assembly Bill No. 298 (1977-1978 Reg. Sess.), which led to

section 340.6, was intended to codify existing case law, including Neel v. Magana, supra, and Budd v. Nixen, supra. The Bill Digest quoted from Neel, supra, 6 Cal.3d at P. 192:

> "'when an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession.'"

Thus, the California Legislature recognized the importance of fairness to malpractice plaintiffs, both for its own merit and for the legal profession's integrity. The bill thus sought to accommodate both the client's "reasonable opportunity to bring suit" and the need to avoid stale claims, which underlies every statute of limitations. See Justice Mosk's dissent in Laird, App. A-61.

The Laird Rule is based on the false conclusive presumption that actual injury and judgment are synonymous. They are not.

A client's possible awareness of a potential malpractice claim does not automatically start the limitation period running without the requisite actual injury. Here, there was no actual injury while Jeri Laird's appeal of right, which she actually pursued, was pending.

Robinson v. McGinn (1987) 195 Cal.App.3d 66, 75. In California, the legal malpractice statute of limitations requires not only actual injury, but discovery by the plaintiff. The Laird court, in direct contradiction to the language of section 340.6, wrongfully subsumes the actual-injury inquiry into the separate question of when the client

discovered or should have discovered the alleged negligence. See Justice Mosk dissent, in Laird, App. A-70.

The actual injury requirement in section 340.6 is vital, because without it a litigant will have to file a malpractice case before she knows whether the underlying case will resolve itself favorably or unfavorably to her. Until the appeal in the underlying case is resolved, the status of a malpractice claim is uncertain. If the appeal is ultimately decided in the client's favor, the malpractice suit is probably moot for lack of damages. To take away petitioner's $1.7 million judgment, which she fairly earned after 10 years of waiting, because she did not sue her lawyers for malpractice before she could know whether they indeed committed

malpractice, takes Jeri Laird's property from her without due process of law.

The Laird Rule requires this petitioner, and others like her to pursue simultaneously both the malpractice action and an appeal of right in the underlying case. This is clearly unduly burdensome. Since petitioner did not waive her right to appeal, but in fact pursued an appeal, her decision clearly implies that she does not consider the judgment of the trial court to be final. As pointed out in Justice Mosk's dissent, the dangers associated with delay in most cases are lessened in a legal malpractice case because a record will have been made of the actions which formed the substance of the later malpractice action. See MFAC Distribution Corp. v. Miller, 673 P.2d at P. 798; Mosk Dissent, in Laird, App. A-78.

The Laird court's rule also reflects the court's fundamental misunderstanding of a "final order in the trial court" and the role of appellate courts. "An appeal is a continuation of a cause of action." People v. Kingspoint (1986) 188 Cal.App.3d 544, 549. (Emphasis in original.) The action "is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed." Id.; Code of Civ. Proc., section 1049; 9 Witkin, California Procedure (3d ed. 1985) Appeal, section 1, p. 33; See also Nationwide Ins. Co. v. Superior Court (1982) 128 Cal.App.3d 713, 715.

There is another insidious aspect to the taking that has occurred here by the Laird Rule. The rule creates an immediate conflict of interest which denies the

attorney the opportunity to correct his error by taking on the appeal. Under the Laird Rule, a "final" loss in the trial court presumptively establishes actual damages and the fact of malpractice. It creates an instant conflict of interest between attorney and client an immediately disrupts the attorney-client relationship. MFAC Distribution Corp. v. Miller, supra, 673 P.2d at pp. 797-798. The client will have no choice but to find new counsel for an appeal if she can find one willing to try to rectify the mistake and if she can afford fees for appellate counsel. Otherwise, the client will be accused of failing to attempt to mitigate damages. See Koffler, Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crises (1986) 20 Akron.L.Rev. 209-226. At the

same time, the client must file her malpractice action, if she can find an attorney and afford the fees.

Before Laird, during the appeal process the attorney's interests merged with those of his client because an adverse ruling trial in the trial court did not carry the presumption of actual damages and the concomitant presumption of malpractice. It was in the client's best interests to try to reinstate a judgment, or obtain a new trial or other remedy. It was in the attorney's best interests to obtain appellate relief and thus eliminate the specter of a potential malpractice action.

The Laird Rule takes away the attorney-client relationship when it is most needed. It destroys it. The Laird holding that a cause of action accrues at

the time of the initial judgment, rather than at the conclusion of the appeal when the damage has become irremediable, requires a client like petitioner to second-guess her attorney. It forces her to obtain other legal opinions on the attorney's handling of the case. MFAC, supra, 673 P.2d at pp. 797-798. Requiring parallel litigation decimates the attorney-client relationship.

The Court of Appeal noted that a trial lawyer will sometimes represent his client on appeal for no charge in order to correct his own mistake. (App. B-132.) Not any more. The instant there is an adverse judgment in the trial court which raises the possibility of attorney error, the attorney's interests become diametrically opposed to those of his

client because damages and malpractice are presumed. Also, the client may not want an attorney who may have been negligent to prosecute the appeal. Understandably, the client may no longer have confidence in that lawyer. Thus, even though keeping the same attorney throughout the appeal would toll the statute (section 340.6 (a)(2)), a litigant should not be coerced into continuing representation so that she does not have to suffer the emotional and monetary burden of simultaneously prosecuting an appeal and the malpractice action. As soon as an adverse judgment occurs at the trial court which raises the possibility of attorney error, the attorney's interests become adverse to that of his client. The attorney must now focus on preparing his own defense in conjunction with his insurance carrier

instead of advancing his client's appeal.[7]

In order to protect himself, the lawyer will undoubtedly divulge confidential information to his attorney.

The Laird Rule not only intrudes on the attorney-client relationship; it absolutely destroys it.

The Laird Rule's abrogation of the requirement of irremediable injury for an accrual of a cause of action for legal malpractice, thereby depriving petitioner of her $1.7 million judgment as well as her reasonable expectation of continuing

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[7] The conflict of interest between Laird and her attorneys in the underlying case could well have led to the attorney's abandoning her instead of their stated reason that Laird did not have the $4,000 her lawyers wanted to prosecute the appeal.

loyalty from her lawyer, constitutes an unconstitutional taking of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

California Code of Civil Procedures Section 340.6 is unconstitutionally vague and overbroad, as written and as interpreted by the State's highest court, concerning its use of the phrase "actual damages" to define the moment of accrual of a cause of action for legal malpractice in California. This constitutes a denial of due process of law.

By treating plaintiffs in legal malpractice actions differently from plaintiffs in other actions and in other actions involving professional negligence, the Laird Rule constitutes a denial of equal protection of the law.

The California Supreme Court's application of the Laird Rule retroactively against petitioner, when she had every right to rely on Heyer v.

Flaig, and the entire line of cases emanating from that decision, constitutes an unconstitutional denial of due process of law.

The Laird court's vacating petitioner's judgment of $1.7 million by holding her untimely for not suing her lawyers before the lawyer's negligence was confirmed on appeal, and the consequential destruction of her attorney-client relationship constitutes a taking of property without due process of law, in contravention of the Fourteenth Amendment to the United States Constitution.

The petition for certiorari should be granted.

DATED: October 11, 1992

Respectfully Submitted,

DAVID E. FRANK
A Professional Law
Corporation

BY
DAVID E. FRANK
Attorney for Petitioner
JERI EMMET LAIRD

APPENDIX A

SUPREME COURT
OF THE
STATE OF CALIFORNIA

JERI EMMET LAIRD,	)	
	)	
Plaintiff-Respondent	)	No. S 021074
	)	
	)	OPINION
v.	)	
	)	
SIDNEY G. BLACKER, as ADMINISTRATOR, etc., et al.	)	
	)	
Defendants-Appellants	)	
	)	

Appeal from the Court of Appeal of the State of California, 2nd Appellate District, May 7, 1992.

Opinion by Chief Justice Lucas; Descent by Justice Mosk.

SUMMARY

Plaintiff brought a legal malpractice action against the attorneys she had retained to prosecute a lawsuit which was dismissed for failure to prosecute. Acting in propria persona, plaintiff had appealed the dismissal of the underlying action and voluntarily dismissed the appeal upon settling with the defendant in that action. Plaintiff's malpractice action was brought 19 months after the underlying action was dismissed, 17 months after she discharged defendant attorneys. but only 8 months after she dismissed her appeal. Defendants moved for nonsuit on the ground of the running of the one-year statute of limitations for legal malpractice actions (Code Civ. Proc. section 340.6). The trial court denied

defendants' motion, and the jury awarded plaintiff $1.7 million. (Superior Court of Los Angeles County No. C 453-404, Robert B. Lopez, Judge.) The Court of Appeal, Second Dist. Div. One, No. B037429, reversed and remanded with directions to enter judgment in favor of defendants.

The Supreme Court affirmed the judgment of the Court of Appeal. It held that the limitations period of Code Civ. Proc. section 340.6, commences when a client suffers an adverse judgment or order of dismissal in the underlying action on which the malpractice action is based. It held that plaintiff sustained actual injury when the trial court dismissed her underlying action and she was compelled to incur legal costs and expenditures in pursuing an appeal, and

that the limitations period is not tolled pending an appeal of the adverse judgment or dismissal. (Opinion by Lucas, C. J. with Panelli, Kennard, Arabian, Baxter and George, JJ, concurring. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports.

(1) Attorneys at Law section 23 - Attorney-client Relationship - Legal Malpractice Actions - Accrual of Action - Effect of Appeal of Underlying Action. - The limitations period for a legal malpractice action of Code Civ. Proc. section 340.6, commences when a client suffers an adverse judgment or order of dismissal in the underlying action on which the malpractice

action is based. At that point the client sustains "actual injury," under section 340.6, subd. (a)(1). When an appeal is taken from an adverse judgment, the injury does not disappear or become suspended while a more final judgment is sought. In enacting section 340.6, the Legislature rejected the judicial rule that the statute begins to run when the client suffers "irremediable harm," and instead codified the rule that the action commences upon the discovery of actual injury. Thus, in a legal malpractice action brought 19 months after plaintiff's underlying action was dismissed for failure to prosecute, 17 months after plaintiff discharged defendant attorneys, but only 8 months after plaintiff

dismissed her appeal of the underlying action, the trial court erred in denying defendant attorneys' motion for nonsuit made on the ground of the running of the one-year statute of limitations. (Overruling to the extent contrary: Heyer v. Flaig (1069)70 Cal.2d 223 [74 Cal.Rptr.225, 449 P.2d 161]. Disapproving to the extent contrary: Robinson v. McGinn (1987) 195 Cal.App.3d 66 [240 Cal.Rptr. 423]; Bell v. Hummell (1982) 136 Cal.App.3d 1009 [186 Cal.Rptr. 688]; Southland Mechanical Constructors Corp. v. Nixen (1981) Cal.App.3d 417 [173 Cal.Rptr. 917].)

[When the statute of limitations begins to run upon action against attorney for malpractice, note, 32 A.L.R. 4th 260; See also Cal.Jur.3d (Rev.)

Attorneys at Law, section 340;3 Witkin, Cal.Procedure (3d ed. 1985) Actions, section 441 et seq.]

(2) Attorneys at Law section 23 - Attorney-client Relationship - Legal Malpractice Actions - Accrual of Action - Tolling During appeal of Underlying Action. - The statute of limitations for legal malpractice actions (Code Civ. Proc., section 340.6) is not tolled pending an appeal of an adverse judgment in the underlying action which is the basis of the malpractice claim. Code Civ. Proc., section 340.6, subd. (a), states that "in no event" shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any

circumstances not enumerated in the statute. The statute and its legislative history make clear that once a client has been injured by an adverse judgment, the limitations period commences and is snot tolled by filing an appeal absent continuous representation by the trial attorney (Code civ. Pro., section 340.6 subd. (a)(2).

(3a, 3b) Courts section 34 - Decisions and Orders - Prospective and Retroactive Decisions - Decision Holding That Statute of Limitations Bars Plaintiff's Action. - A California Supreme Court decision holding that the limitations period for legal malpractice actions of Code Civ. Proc., section 340.6, commences on adverse judgment or dismissal of the underlying action

applied to plaintiff who brought the appeal. The decision was based on the Legislature's rejection in 1977 of a judicial ruling stating that the statute begins to run when a client suffered "irremediable harm," and its acceptance of the rule that stated the statute begins to run when the client discovers actual injury. Several intervening cases followed the latter rule. Thus, the Supreme Court's holding was not a departure from generally accepted principles.

(4) Courts Section 36 - Decisions and Orders - Prospective and Retroactive Decisions - Factors Considered. - The general rule is that judicial decisions are given retroactive effect. Departure from this rule is limited to those narrow

circumstances in which considerations of fairness and public policy preclude retroactivity. A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts look to the hardships imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases.

COUNSEL

Horvitz & Levy, Ellis J. Horvitz, David S. Ettinger and Frederic D. Cohen for Defendants and Appellants.

Francis C. Pizzulli and Charlotte E. Costan for Plaintiff and Respondent

King & Seligsohn and Stephen Scott King as Amici Curiae on behalf of Plaintiff and Respondent

OPINION

LUCAS, C. J.-We granted review to determine whether the one-year statute of limitations for attorney malpractice actions under Code of Civil Procedure section 340.6 subdivision (a) (all further statutory references are to this code unless otherwise stated) is tolled during the time the client appeals from the underlying judgment on which the claim of malpractice is based.

Section 340.6 provides that the statute of limitations for legal malpractice commences when the client discovers, or should have discovered, the cause of action. The period is tolled during the times, inter alia, (i) the client "has not sustained actual injury, " (ii) the negligent attorney continues to represent the client, (iii) the attorney willfully conceals facts

constituting the negligence, or (iv) the plaintiff is under a disability that "restricts the plaintiff's ability to commence legal action."[1]

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[1]Section 3340.6 in its entirety provides:

"(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

"(1) The plaintiff has not sustained actual injury;

"(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

"(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

The question before us is: what constitutes "actual injury"-the judgment against plaintiff, or the finality of the appeal therefrom?

We conclude the limitations period of section 340.6 commences when a client suffers an adverse judgment or order of dismissal in the underlying action on which the malpractice action is based. As explained below, our holding conforms to legislative intent, and adopts the present majority view as explained in the most recent cases interpreting the statute at issue here and similar

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"(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

"(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this sections shall commence to run upon the occurrence of such act or event."

statutes in other states.

I. BACKGROUND

Plaintiff, a television writer, retained the law firm of Berg & Spire to prosecute a lawsuit against Spelling-Goldberg, a television production company. She alleged that Spelling-Goldberg based its television series "Family" on a script she had submitted, but failed to acknowledge or credit her contribution. After serving the complaint, Berg & Spire failed to pursue the matter and plaintiff retained attorney Barry Post and the law offices of Samuel Z. Winnikoff (hereafter defendants) to prosecute the same suit.[2]

On October 20, 1981, the suit was

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[2]Defendant Sidney G. Blacker represents the estate of Samuel Winnikoff. Plaintiff sued Blacker as administrator of Winnikoff's law firm.

dismissed for lack of persecution, (section 583.410.) On December 7, 1981, plaintiff discharged defendants and filed a notice of appeal in propria persona because she could not afford legal fees for the appeal. On September 15, 1982, she voluntarily dismissed her appeal after settling with Spelling-Goldberg for $1,000. On May 17, 1983, 19 months after her action against Spelling-Goldberg was dismissed 17 months after Post and Winnikoff were discharged, but only 8 months after she voluntarily dismissed her appeal, plaintiff filed the present malpractice action against Berg & Spire. In February 1986, she amended her complaint to add the present defendants.

Plaintiff settled with Berg & Spire for $50,000 and proceeded to trial against defendants. Defendants moved for a nonsuit, asserting the one-year

limitation period of section 340.6, subdivisions (a) began running when plaintiff's suit against Spelling-Goldberg was dismissed, regardless of her ensuing appeal.[3] Plaintiff asserted her cause of action for legal malpractice did not accrue until she dismissed her appeal on September 15, 1982. Defendant's motion was denied, and the jury awarded plaintiff approximately $1.7 million in damages. Defendants' motion for a judgment notwithstanding the verdict was denied. Defendants appealed.

The Court of Appeal reversed and remanded with directions to enter judgment in facor of defendants. It held under section 340.6, subdivision (a),

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[3]As noted above, a separate provision tolls the limitation period until the attorney accused of

plaintiff sustained actual injury on December 7, 1981, when her case was dismissed and judgment was entered against her. Plaintiff appeals that decision, and asks this court to hold the limitations period was tolled until her appeal of right was resolved. We affirm the Court of Appeal decision.

II. DISCUSSION

1. Background

Prior to 1977, the statute of limitations for legal malpractice actions was governed by section 339, subdivision 1, which provides a two-year limitations period for any action based on "a contract, obligation or liability not

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malpractice no longer represents the plaintiff in the underlying action. (section 340.6 subd. (a)(2).) Defendants agree that the earliest date the statute could have begun running was December 7, 1981, after plaintiff's suit was dismissed and she discharged them.

founded upon an instrument in writing... "Although section 339, subdivision 1, did not establish an accrual date for legal malpractice actions, courts generally adopted, as the date of accrual, the date on which the malpractice occurred. (Hays v. Ewing (1886) 70 Cal. 127 [11 P.602] [cause of action for attorney malpractice barred at expiration of two years after neglect occurred].) Recognizing the harshness of a strict occurrence rule, later cases held that a cause of action for legal malpractice accrued when a plaintiff suffered "irremediable damage." (See, e.g.Heyer v. Flaig (1969) 70 Cal.2d 223, 230 [74 Cal.Rptr. 225, 449 P.2d 161] [statute of limitations for legal malpractice begins to run on date attorney performs last negligent act].) Finally, when the Legislature adopted section 340.6 in 1977, it implicitly

rejected the term "irremediable damage" and codified the discovery rule of Neel v. Magana, Olney, Levy, Cathcart and Gelfand (1971) 6 Cal.3d 176 [98 Cal.Rptr. 837, 491 P.2d 421] (hereafter Neel), and Budd v. Nixen (1971) 6 Cal.3d 195, 198 [98 Cal.Rptr. 849, 491 P.2d 433] (hereafter Budd). These cases hold that a cause of action for legal malpractice accrues when the client discovers or should discover the facts essential to the malpractice claim, and suffers appreciable and actual harm from the malpractice. Discovery of any appreciable and actual harm from the attorney's negligent conduct establishes a cause of action and begins the running of the limitations period. (Budd, supra, 6 Cal.3d at p.201.)

Both Budd, supra, 6 Cal.3d 195, and Neel, supra, 6 Cal.3d 176, addressed the

former two-year legal malpractice statute of limitations (section 339), but did not specifically determine whether actual injury occurs when the client suffers an adverse judgment or after an appeal of right is concluded and the judgment is final. Rather, Neel and Budd suggested the time of discovery is often a question of fact for the jury. Neel, however, explained the holding in Hays v. Ewing, supra, 70 Cal. 127, which interpreted the limitations period of section 339 when the malpractice occurred in the course of litigation. Neel stated that the Hays court "accepted the date of dismissal of the suit-that is, the date upon which the client suffered damage-as the crucial point from which the statute of limitations should run. Indeed, the court refused to adopt as the critical time the date of the affirmance of the dismissal

on appeal. (Neel, supra, 6 Cal.3d at p.183.)

The Budd court further explained that, "Ordinarily, the client has already suffered damage when he discovers his attorney's negligence, as occurred in Neel... In other cases, the infliction of the damage will alert the client to the attorney's negligence and thus the statute of limitations will then begin to run on any malpractice action. Only in the unusual case will the client discover his attorney's negligence without having suffered any consequential damage." (Budd, supra, 6 Cal.3d at p. 201.)

Budd also noted that, in general, a plaintiff suffers actual damage on entry of adverse judgment. Although the court commented that a losing defendant in the underlying action may suffer harm when he incurs monetary damages (attorneys fees,

bond and court costs), this recognition of when monetary damage occurs was not the basis for the Budd decision. The court emphasized that the focus of the statute of limitations for legal malpractice should be on discovery of the fact of damage, not the amount. Indeed, the court observed that the cause of action may arise before the client sustains all or even the greater part of damage (Budd, supra 6 Cal.3d at pp 200-201.)

Nonetheless, Budd's reference to monetary damage has caused conflict in the courts. Taken at face value, the Budd language supports a conclusion that an appeal does not extend the period of limitations beyond adverse judgment. As the court of Appeal herein observed, "Where, however, the malpractice occurs in the course of representing a

plaintiff, there is no risk of execution and no need to post a bond. There may or may not be attorney's fees incurred, lost interest or other expenses."

This uncertainty over when damage occurs has led to conflict in the Courts of Appeal. Some courts rely on Budd to support application of the earlier "irremediable damage" rule that the Legislature rejected when it codified section 340.6 (See, e.g., Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal.App.3d 417, 434 [173 Cal.Rptr. 917] [actual damage occurs when plaintiff in underlying action incurs and pays attorney fees, legal costs and expenditures].)

By contrast, several recent cases hold that when the client is a losing plaintiff in the underlying action, an appeal of the dismissal of the action

does not affect the date of actual harm under section 340.6 (i.e., adverse judgment and dismissal of the negligent attorney). For example, in Troche v. Daley (1990) 217 Cal.App.3d 403, 410 [266 Cal.Rptr 34], Attorney Turney filed a lawsuit in the federal district court on behalf of his client, Troche in May 1981. In August 1982, new counsel Daley, was substituted for Turney. In May 1984, Daley filed a notice of appeal in the underlying action. In August 1984, Troche discharged Daley as her counsel on appeal, and in September 1984, Troche substituted Griffin as her attorney of record. In March 1985, the district court "denied Troche's request to appeal in forma pauperis because the court was unable to certify the appeal as not frivolous." (Id. at p. 406)

Two months later, Troche filed a

legal malpractice action against Turney and Daley.

Thereafter, in October 1987, Turney moved for summary judgment asserting that Section 340.6 barred the action. The trial court granted the motion after finding that the cause of action arose in May 1984, when the district court dismissed the underlying action for failure to timely serve a party.

The Court of Appeal affirmed on the ground that as a matter of law, the latest time Troche had knowledge of the alleged malpractice was August 1984, when she discharged Daley as her counsel. The court concluded that the damage occurred in May 1984, when the district court dismissed the lawsuit, and that Troche's attempts to appeal the dismissal of the federal action did not toll the statute because it did not affect the date Troche

suffered actual harm. (Troche, supra, 217 Cal.App.2d at p.411.)

The court relied on Budd, supra, 6 Cal,3d at page 201, and Neel, supra, 6 Cal.3d at page 194, to hold that the client's discovery of the attorney's negligence, and his or her incurring damage from that negligence, marks the accrual of a cause of action for malpractice. (Troche, supra, 217 Cal.App.3d at pp. 410-411.) The Troche court observed that as in Neel, supra, and Hays, supra, 70 Cal. 127, a client suffers damage on the date the underlying action is dismissed, and that the conduct of a plaintiff in connection with subsequent proceedings seeking reversal of the dismissal on appeal does not affect the accrual of a cause of action under the statute. (Troche, supra, 217 Cal.App.3d at p. 411; see also Neel,

supra, 6 Cal.3d at p. 183.)

The Court of Appeal below followed the Troche reasoning and observed that the "timeliness of a malpractice action should not turn on whether the client happened to be a plaintiff or defendant or happened to appeal..... To attempt to quantify damage or injury pending an appeal necessarily results in a distinction between plaintiffs and defendants and a contest about whether a particular expenditure is sufficient to trigger the limitations period." As the court observed, the Legislature used the term "actual" to focus on the fact that damage occurred, and eliminated all qualifiers to prevent confusion that would arise by requiring courts to consider the total amount of damages.

Troche, supra, 217 Cal.App.3d 403, has been followed in the most recent

cases interpreting section 340.6. In Turley v. Wooldridge (1991) 230 Cal.App.3d 586, 593 [281 Cal.Rptr. 441], a malpractice plaintiff filed suit against her former attorney on the ground his negligence resulted in a marriage dissolution judgment that failed to accord her the full spousal support to which she was entitled. The Court of Appeal held the plaintiff's malpractice action accrued no later than the date of adverse judgment, and refused to toll the statute of limitations for six months after judgment was entered simply because the plaintiff had the right during that time to challenge the judgment under section 473.

Finally, in Worton v. Worton (1991) 234 Cal.App.3d 1638 [286 Cal.Rptr. 410], plaintiff wife sued her former husband for fraud and conversion, and her former

attorney for legal malpractice, claiming that her former attorney negligently failed to discover excess assets hidden by her ex-husband. The court held the malpractice action was barred under section 340.6 because the wife's malpractice lawsuit was filed more than one year after entry of the dissolution judgment that failed to divide the excess assets.

Justice Lillie relied on Budd, supra, 6 Cal.3d 195, and Troche, supra, 217 Cal.App.3d 403, to hold that a "client sustains actual injury when, as a result of the attorney's negligence, a judgment is entered against the client." (Worton, supra, 234 Cal.App.3d at p. 1651.) The court rejected the wife's claim that the availability of an appeal should have tolled the limitations period, observing that the "availability

of an appeal from a judgment in a civil action does not make 'remediable' the harm the client sustained upon entry of the judgment for purposes of tolling the statute of limitation for legal malpractice. [Citation.]" (Id. at pp. 1651-1652.) As the Worton court observed, tolling the statute during an appeal would place "the statute of limitations for legal malpractice... in the power of the client who could cause the statute to be tolled indefinitely" and, hence, thwart "the purpose of the statute of limitations which is 'to require "diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs, and ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh." [Citations.]'" (Id. at p. 1652.)

(1) The foregoing cases recognize that the focus of section 340.6 is on discovery of the malpractice and actual injury, not success on appeal or proof of the total amount of monetary damages suffered by the former client. For example, in order to prosecute a malpractice action, the former client as plaintiff must show a breach of the attorney's duty of care and that the breach caused the plaintiff harm. To establish this harm or damage, the client must prove that careful management of the underlying action would have resulted in a favorable judgment and the collection thereof, or, if the client were defending that the proper handling of the case would have resulted in a defense verdict.

We disagree with plaintiff that actual injury should be defined in terms of monetary amount and that a successful

appeal negates the client's ability to file a malpractice action. To the contrary, although appellate review may correct judicial error, and thus reduce the client's damages, an appeal does not necessarily exonerate the attorney, nor does it extinguish the client's action against him for negligence in the conduct of trial. (See also 2 Mallen & Smith, Legal Malpractice (3d ed. 1989) section 18.11, p. 111.)

Thus, even if the former client loses the underlying action because of the attorney's malpractice, success on appeal does not negate an action for legal malpractice. In essence, plaintiff asks us to ignore the fact that the focus of a legal malpractice action (when litigation is involved) is the attorney's conduct in the underlying case. As Mallen and Smith observe, when an appeal is

taken from an adverse judgment, "an injury does to disappear or become suspended because a more final adjudication of the result is sought." (2 Mallen & Smith, supra, at p. 111.)

Under the foregoing authority, we hold that under section 340.6, the statute of limitations for legal malpractice actions commences on entry of adverse judgment or final order of dismissal. Plaintiff herein, therefore, sustained actual injury when the trial court dismissed her underlying action and she was compelled to incur legal costs and expenditures in pursuing an appeal. Her case also lost considerable settlement value and potential interest on any monetary award that would have been awarded absent the malpractice, once the action was dismissed.

Nonetheless, plaintiff asserts that

she did not suffer actual injury until her appeal of right was dismissed. Until that point, plaintiff maintains, her damages were only speculative. She contends that several Court of Appeal cases support her assertion that the negligence caused by the malpractice must be "irremediable" before the statute of limitations under section 340.6 will begin to run. As noted above, plaintiff proposes a tolling rule that would extend commencement of the statute of limitations up to the point that an appeal of right is dismissed, without addressing whether accrual should be tolled until resolution of further discretionary review.

Her position is unpersuasive. Plaintiff confuses the distinction between the fact and knowledge of damage, and the amount of damage. (Budd, supra, 6

Cal.3d at pp. 200-201.) As defendants observe, there are no California cases holding that a cause of action for legal malpractice is tolled on filing an appeal from the underlying judgment. Although there are several cases reasoning that a client must suffer "irremediable injury" before a claim for malpractice can be filed, as we explain, none holds that the statute of limitations is tolled simply because the client pursues an appeal.

For example, plaintiff relies on Heyer v. Flaig, supra, 70 Cal.2d 223, which holds that when an attorney is accused of malpractice in drafting a will for failing to follow the testamentary directives of a client, a cause of action for malpractice accrues on the date of the testatrix's death. Only then do the beneficiaries suffer "irremediable injury." (Id. at p. 225.) Our holding was

based on the rationale that an attorney owes the beneficiaries a continuing fiduciary duty throughout the representation of the client.

Next, in Bell v. Hummel (1982) 136 Cal.App.3d 1009 [186 Ca.Rptr.688], the defendant attorney was negligent in failing to assert a cause of action on his client's behalf against a doctor for medical malpractice. The client conceded that he discovered the malpractice more than a year before he filed his action against the attorney. He had hired new counsel who sought to avoid the statute of limitations bar by joining the client's malpractice claim with client's wife's claim for medical malpractice that was pending before the court. The court concluded that the client's actual injury, for purposes of section 340.6, occurred when the trial court denied his

motion to amend the complaint to add his name. The court held: "[T]he impact and accrual of the damages [did not occur until] the new attorney failed in his attempt to rectify the previous mistake . . . Until the court denied (husband) the right to joint his wife's complaint as a coplaintiff in order to assert his claims arising from the alleged medical malpractice, his damage has not fully accrued. It was not until then that his claims were lost and the full impact of the wrongful acts settled leaving damage that was for all practical purposes irremediable." (Bell v. Hummel, supra, at pp. 1016-1017.) The court held that appreciable harm did not occur until the attorney's error became irremediable, a conclusion impliedly rejected by the Legislature when it adopted section 340.6.

In Southland Mechanical Constructors Corp. supra, 119 Cal.App.3d 417, the Court of Appeal accepted the defendant attorney's contention that the malpractice action filed against him accrued on the date the plaintiff's right to appeal from an adverse agency decision expired. The court rejected the plaintiff's contention that no injury resulted from the dismissal of the agency proceeding as long as tort litigation seeking identical relief was still pending. As the Court of Appeal herein observed, the Southland court assumed erroneously that the term "irremediable," as taken from the rule of Heyer, supra, 70 Cal.2d at page 230, must be read into the term "actual" in section 340.6, subdivision (a)(1).

In Robinson v. McGinn (1987) 195 Cal.App.3d 66 [240 Cal.Rptr. 423], a

police officer was injured in the line of duty. He claimed his attorney's negligent representation in his personal injury claim caused him to lose his job and his pension. In the subsequent malpractice action, the court had to determine whether the statute of limitations accrued when he was denied reinstatement and pension benefits, or when the client lost his administrative appeal. The Court of Appeal held the statute was tolled until the city made its final administrative adjudication, reasoning that no irremediable harm had been suffered by the officer until the attorney's error could no longer be remedied.

Turley v. Wooldridge, supra, 230 Cal.App.3d 586, analyzed the Bell and Robinson decisions, and asserted that those cases simply misused the term

"irremediable." As the Turley court observed, "while the cases use the term "irremediable," they obviously do not mean absolutely irremediable." For example, "Bell's cause of action accrued when the trial court denied his motion to join his claim with his wife's, not when that decision was immune from challenge by way of motion for reconsideration or appeal. Finally, Robinson's claim accrued when he exhausted his administrative remedies without regard to potential judicial remedies." (Id. at p. 592; see also Goebel v. Lauderdale (1989) 214 Cal.App.3d 1502 [263 Cal.Rptr. 275] [cause of action for attorney malpractice accrues when client is convicted of crime]:)

The Court of Appeal herein also criticized the above cases for

relying on the "irremediable damage" rule rejected by the Legislature when it adopted section 340.6. The court stated, "According to Robinson, the rule we adopt today will further burden our existing overly crowded court calendars with the filing of potentially meritless lawsuits by [clients] waiting to learn whether they indeed will be suffering irremediable harm.' First, Robinson mistakenly assumes the continuing viability of 'irremediable.' Second, Robinson also implicitly assumes a volume of cases in this category that is not apparent form the number of published opinions on this point (or from any other source available to us). Third, Robinson ignores the fact that the same attorney may represent the client on the appeal, thereby tolling the statute for a different reason. (section 340.6, subd.

(a)(2).) Fourth, Robinson fails to consider the possibility that an attorney might stipulate to extend the period of limitations until all appeals are concluded. Fifth, Robinson ignores the fact that since most appeals result in affirmance, deferral of the malpractice action is a postponement, not an avoidance." Based on the above, we conclude to the extent Robinson, supra, 195 Cal.App.3d 66; Bell, supra, 136 Cal.App.3d 1009; Southland, supra, 119 Cal.App.3d 417, and Heyer, supra, 70 Cal.2d 223, conflict with our decision in this case, they are disapproved.

Finally, plaintiff relies on In re Blythe (1893) 99 Cal. 472 [34 P. 108], and Chambers v. Farnham (1918) 39 Cal.App. 17 [179 P. 423], to contend that before final resolution of the underlying case, a client may not introduce into

evidence the adverse trial court judgment as evidence of the attorney's negligence. Both cases, however, are inapposite. They hold that in order for a separate judgment to be admissible in evidence in a new cause for the purpose of proving facts therein recited, the judgment must be a final judgment in the cause. (Blythe, supra, 99 Cal. at p. 475; Chambers, supra, 39 Cal.App at pp. 20-21.) These cases simply reiterate the rule of section 1049, which provides, "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

As defendants observe, plaintiff's reliance on Blythe, supra 99 Cal. 472, and Chambers, supra 39 Cal.App 17, is misplaced. The issue before us is what

constitutes "actual injury" for purposes of section 340.6, not what constitutes finality of judgment. Moreover, as the Chambers court observed, section 1049 "is limited in its application by the exception that such a judgment may be received in evidence in proof of facts which are merely incidentally or collaterally involved, when such facts are not directly in issue."

(39 Cal.App. at p. 21.) The present matter clearly falls within such exception, for the fact of adverse judgment is provable notwithstanding the filing of a subsequent appeal.

2. **Legislative History**

(2) Section 340.6, subdivision (a), states that "in no event" shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature

expressly intended to disallow tolling under any circumstances not enumerated in the statute.

Section 340.6 and its legislative history make clear that once a client has been injured by an adverse judgment, the limitations period commences and is not tolled by filing an appeal absent continuous representation by the trial attorney. (See 340.6, subd. (a)(2).) This "continuous representation" rule was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." (Sen. Com. on Judiciary, 2d reading analysis of Assem. Bill No. 298 (1977-1978) Reg.

Sess.) as amended May 17, 1977.) Thus, the Legislature, by creating a limited exception for cases involving continuous representation, clearly intended the limitations period should not be extended beyond final judgment when continuous representation was not an issue.

The policy behind the limited tolling periods in the statute is clear. If we nonetheless hold that the statute is tolled pending an appeal, we allow clients, with knowledge that they have suffered actual injury, unilaterally to control the commencement of the statute of limitations and hence undermine the legislative goal of resolving cases while the evidence is fresh, witnesses are available, and memories have not faded. Accordingly, we decline to adopt plaintiff's position.

3. Decisions in Other States

As defendants observe, our decision today is further supported by the majority of jurisdictions with statutes substantially identical to our own. (See, e.g. Dearborn Animal Clinic P.A. v. Wilson (1991) 248 Kan. 257 [806 P.2d 997, 1006] [where client required to initiate legal action because attorney negligently drafted sales contract, malpractice action accrues "even though the underlying action may not have been finally resolved"]; Braud v. New England Ins. Co. (La. 1991) 576 So.2d 466, 469-470 [client suffered "appreciable and actual harm" when federal action filed to annul prior judgment favorable to client because of alleged errors by client's attorney; malpractice action not tolled while federal action pending]; Belden v. Emmerman (1990) 203 Ill.App.3d 265, 148 Ill.Dec. 583 [560 N.E.2d 1180, 1183]

[rejecting argument that client not harmed until appeal in underlying case resolved: "[T]he only difference between affirmance and reversal is the amount of damage sustained,"]; Basinger v. Sullivan (Ind.Ct.App. 1989) 540 N.E.2d 91, 94 [malpractice action accrued when clients learned attorney failed to file suit prior to expiration of statute of limitations, even though alternative avenues of relief not yet exhausted]; Zimmie v. Calfee, Halter & Griswold (1989) 43 Ohio St.3d 54 [538 N.E.2d 398] [malpractice action accrued when trial court invalidated prenuptial agreement and was not tolled during appeal]; Wettanen v. Cowper (Alaska 1988) 749 P.2d 362, 365 [malpractice action accrued upon entry of adverse interlocutory judgment and was not tolled pending final judgment]; Hayden v. Green (1988) 431

Mich. 878 [429 N.W.2d 604] [client suffered "appreciable and identifiable harm" when trial court dismissed his suit; malpractice cause of action not tolled during appeal]; Jankowski v. Taylor, Bishop & Lee (1980) 246 Ga. 804 [273 S.E.2d 16] client harmed by dismissal of suit even though action could be refiled].)

Plaintiff, in contrast, relies on out-of-state cases interpreting legal malpractice statutes of limitations that do not have the "continuous representation" exception codified in section 340.6, subdivisions (a)(2). Thus, these cases are inapposite. The tolling rule plaintiff advances is necessary in such jurisdictions because without it the statute of limitations would run on the client's malpractice action even though trial counsel continued to represent

plaintiff on appeal. (See, e.g. Neylan v. Moser (Iowa 1987) 400 N.W.2d 538, 542, Amfac Distribution Corp. v. Millar (1983) 138 Ariz. 155 [673 P.2d 795]; Bonnano v. Potthoff (N.D. Ill. 1981) 527 F.Supp. 561, Woodruff v. Tomlin (6th Cir. 1975) 511 F.2d 1019.)

Finally, no case in any jurisdiction supports tolling the statute until an appeal of right is resolved, without waiting until review is exhausted on final judgment. Indeed, our prior cases would reject this position outright. (See, e.g., Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal.3d 1072, 1079 [282 Cal.Rptr. 445, 811 P.2d 737].) In Lambert, the insured's cause of action against his title insurer for refusal to defend under section 339 was tolled until final judgment in the underlying third party action. Equitable tolling was based

on the insurer's continuing duty to defend until final judgment, and on the fact the "[t]he Legislature cannot have anticipated the need to provide for equitable tolling during the time of the continuing duty." (Ibid.)

4. Retroactivity

(3a) Plaintiff requests that if we could conclude the limitations period of section 340.6 commences on adverse judgment or dismissal of the underlying action, our holding should not apply to her because it represents a departure from the established law she relied on in delaying the filing of her case, namely, Heyre v. Flaig, supra, 70 Cal.2d 223.

(4) We reject plaintiff's request. The general rule is that judicial decisions are given retroactive effect. (Newman v. Emerson Radio Corp. (1989) 48 Cal.3d 973, 978 [258 Cal.Rptr. 592, 772

P.2d 1059].) Departure from that is limited to those narrow circumstances in which considerations of fairness and public policy preclude retroactivity. In sum "A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the "hardships" imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases." (Id. at p. 983.)

(3b) With this concept in mind, we reject plaintiff's claim. As explained

above, our holding is based on the Legislature's rejection of the "irremediable damage" rule of Heyer v. Flaig, supra, 70 Cal.2d 223, and its subsequent adoption of the rule of Budd, supra, 6 Cal.3d 195, and Neel, supra, 6 Cal.3d 176. The majority of cases recently interpreting section 340.6 have also followed the Budd and Neel reasoning in holding that the statute of limitations accrues on final judgment. (See, e.g., Worton, supra, 234 Cal.App.3d 1638, 1651.) Our application of these cases to the facts before us does not, therefore, represent a departure from generally accepted principles. We conclude that there is no compelling reason in this case to depart from the general rule of retroactive application of judicial decisions. (See Newman v. Emerson Radio Corp., supra, 48 Cal.3d at

p. 993.)

III. CONCLUSION

We cannot rewrite the section 340.6 to adopt the rule advocated by plaintiff. The statute is clear on its face the and the Legislature has provided for tolling in specific enumerated circumstances, none of which apply here. As noted above, the Legislature intended that "in no event" should the limitations period be tolled except as stated in the statute. Accordingly, the Court of Appeal judgment is affirmed.

Panelli, J., Kennard, J., Arabian J., Baxter, J., and George J., concurred.

MOSK, J.,- I dissent. For the reasons stated below, consistent with case law and legislative intent, I believe the requirement of "actual injury" in Code of Civil Procedure section 340.6 (hereafter section 340.6)

is intended to toll the limitations period for filing legal malpractice actions when, as here, a client takes an appeal of right from the underlying judgment and is awaiting is outcome. The majority's construction of the statute forces litigants to file malpractice actions-and attorneys to defend such actions-without knowing whether the case on which the claim of malpractice is based will be won or lost. This interpretation helps neither the client nor the overburdened judicial system.

The majority err in declaring (maj. opn., ante, p. 620) that section 340.6 is "clear on its face." A statute that is clear on its face does not require a lengthy opinion to expound its meaning, nor does it generate the varying interpretations seen in the case law. On the contrary, the phrase "actual

injury" in section 340.6 is not self-explanatory, as noted by the State Bar in prescient letter to the Governor. (Letter of Edward Rubin, Pres. of State Bar, Sept. 13, 1977, warning that the phrase was ambiguous and would lead to litigation.)

The first step in our analysis is to acknowledge that "actual injury" is not self-defining. Then we must look to the rest of the statute to ascertain the phrase's meaning contextually. Next, an examination of the legislative history and the case law is instructive. Finally, I would test the conclusion in the crucible of practicality.

Statutory Scheme

Insofar as relevant here, the statute prescribes that two elements must be met before the limitation period runs; first, the client must discover the

malpractice; second, even after the malpractice is discovered, the period is tolled until there is "actual injury." I emphasize this point because it is important: a client cannot reasonably be expected to commence a lawsuit against the attorney every time the attorney errs; thus, even after the error is discovered, section 340.6 allows the client to wait until the requisite injury is suffered. An analysis of "actual injury" that focuses, as the majority's does, on discovery of the cause of action is inconsistent with the statutory scheme.

The majority further err in their assumption that the "continuous representation" rule resolves the dilemma before us. The implication appears to be that if the actual injury-tolling provision were intended to encompass the

pursuit of an appeal of right, the continuous representation rule would be unnecessary. This leap of faith lacks basis. The continuous representation rule serves several purposes. As the majority point out (maj. opn., ante, p. 618), quoting from the Senate Judiciary Committee Report, it enables "'the attorney to correct or minimize an apparent error.'" However, the quotation goes on to observe that the rule also serves other purposes, such as preventing "'attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'"

For the majority, this quotation from the Senate Judiciary Committee Report somehow leads to its unsupported conclusion that the Legislature "clearly intended the limitations period should

not be extended beyond final judgment when continuous representation was not an issue." (Maj. opn., ante, p. 618.) Nowhere in the legislative history is such an intention even hinted at, let alone made clear.

Legislative History

The majority contend that the legislative history of section 340.6 clearly resolves the present issue. This unfortunately, is not the case.

The Legislative history neither discusses nor defines "actual injury"; the majority's "clear" answer is nothing more than its own gratuitous construction of an ambiguous statute.

As observed above: section 340.6 does not provide, on its face or in its legislative history, a definition of "actual injury." Thus, I turn to the policies behind the statute's enactment.

The Legislative record reveals that Assembly Bill No. 298 (1977-1978 Reg. Sess.), which led to section 340.6, was intended to codify existing case law, including Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176 [98 Cal.Rptr. 837, 491 P.2d 421], and Budd v. Nixen (1971) 6 Cal.3d 195 [98 Cal.Rptr. 849, 491 P.2d 433]. The bill digest quoted from Neel, supra, 6 Cal.3d at page 192. "'When an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession.'"

The Legislature recognized the importance of fairness to malpractice plaintiffs, both for its own merit and

for the legal profession's integrity. The bill thus sought to accommodate both the client's "reasonable opportunity to bring suit" and the need to avoid stale claims, which underlies every statute of limitations.

Case Law

In direct contradiction to the majority's holding, California courts confronted with a client who has pursued an appeal of right from the underlying judgment have interpreted "actual injury" to toll the limitation period until the resolution of that appeal. Cases on which the majority rely are not on point, either because there was no appeal of right or because the appeal was not pursued.

The majority rely on a dictum in Budd v. Nixen, supra, 6 Cal.3d 195, a case preceding the adoption of section

340.6 that was based on an entirely different statute. Budd declared that in general a litigant suffers actual damage on entry of an adverse judgment. The majority seek to read into this generalization an unbending rule equating actual injury with judgment. In Budd, unlike the present case, the client did not timely pursue his appeal of right; we wisely left room for situations, not posed by the case then before us, in which actual injury and judgment may not be synonymous.

The case law interpreting section 340.6 finds no actual injury pending resolution of an appeal of right taken from the judgment on which the malpractice is based. Robinson v. McGinn (1987) 195 Cal.App.3d 66 [240 Cal.Rptr. 423], is directly in point. There a police officer injured on the job

retained the defendant attorney to represent him in several matters, including a disability pension claim. When sued for malpractice, the attorney raised the bar of section 340.6. The Court of Appeal held that the limitation period was tolled until the city decided the client's administrative appeal of right. The client's awareness of the potential malpractice claim did not automatically start the limitation period running absent the requisite injury, nor was there actual injury while an appeal of right, actually pursued, was pending (195 Cal.App.3d at p. 75.)

In the recent case of Troche v. Daley (1990) 217 Cal.App.3d 403 [266 Cal.Rptr. 34], on which the majority mistakenly rely, there was no appeal of right; thus under my proposed construction the limitation period would

not have been tolled. There the client was apparently unable or unwilling to pay the requisite fees to appeal and could not get the appeal certified as nonfrivolous in order to appeal, under the governing federal law, in forma pauperis. The Court of Appeal held there was actual injury when the client's underlying federal lawsuit was dismissed because of the alleged negligence of her attorney. Her unsuccessful attempts to appeal did not affect the date of actual injury (Id. at p. 411.) The court did not discuss the issue whether an appeal in forma pauperis should be considered an appeal of right when, rather than being entitled to it, the litigant was required under federal law to have the appeal certified as nonfrivolous.

Similarly, in Turley v. Wooldridge (1991) 230 Cal.App.3d 586 [281 Cal.Rptr.

441], although there was an appeal of right, the court refused to toll the limitation period because the client did not pursue that appeal. While not foreclosing the possibility that a pending appeal may prevent a finding of actual injury, the Court of Appeal refused to hold the limitation period was tolled when the litigant had not actually pursued her appeal. (Id. at p. 593.)[1]

Indeed, the majority's reliance on Turley v. Wooldridge, supra, 230 Cal.App.3d 586, is inexplicable, as that case strongly supports my position.

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[1]In malicious prosecution actions a pending appeal is treated similarly: it tolls the limitation period only if actually pursued. (Karody-Kolyer Corp. v. General Motors Corp. (1989) 208 Cal.App.3d 1148, 1151 [256 Cal.Rptr. 658]; Rare Coin Galleries, Inc. v.

Contrasting its situation with that of Robinson v. McGinn, supra, 195 Cal.App.3d 66, The Turley court reiterated that the statute was properly tolled in Robinson because the client there had pursued his administrative appeal of right. (230 Cal.App.3d at p. 593.) By contrast the court stressed that "Turley did not pursue any of the legal or equitable remedies available to her to challenge the purportedly unfair Agreement terms." (Ibid,) Thus, the Turley court construed

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A Mark Coin Co., Inc. (1988) 202 Cal.App.3d 330, 335 [248 Cal.Rptr.341]) The majority construction of section 340.6 gives attorney malpractice defendants an unjustified advantage over other civil defendants an unjustified advantage over other civil defendants by requiring litigants such as Ms. Laird to file the malpractice suit while awaiting the outcome of the underlying case.

"actual injury" precisely as I propose.

In the recent case of Worton v. Worton (1991) 234 Cal.App.3d 1638 [286 Cal.Rptr. 410], no postjudgment motion or appeal was actually filed, although the client had the right to do so. I fully agree that the statute should not be tolled unless an appeal is actually pursued. The majority in Worton held that "[t]he availability of an appeal from a judgment in a civil action does not make 'remedial' the harm the client sustained upon entry of the judgment for purposes of tolling the statute of limitation for legal malpractice." (Id. at p. 1652.) Justice Johnson concurred in the judgment, but pointing out (citing Robinson v. McGinn, supra 195 Cal.App.3d 66) that although the mere availability of an appeal should not preclude a finding of actual injury (234 Cal.App.3d

at p. 1653), once an appeal is taken there is no actual injury until it is resolved.

Many of the out-of-state decisions upon which the majority rely construe statutes of limitation unlike our own. Again, the majority fail to realize that our statute contains two distinct requirements: discovery and actual injury. Many states' statutes of limitation begin running when the client discovers the malpractice regardless of "actual injury." For example, in Belden v. Emmerman (1990) 203 Ill.App.3d 265, 148 Ill. Dec. 583 [560 N.E.2d 1180, 1182-1183], on which the majority rely, the court analyzed the running of the statute by looking solely at the clients' knowledge of the damages caused by the alleged malpractice. It held the statute began running before the resolution of

the appeal from the underlying action because "the element of damage was known or should have been known to plaintiffs..." (Id. at p. 1183.)

That may be the law in Illinois as held by its intermediate appellate court, but it is only half the law in California; if we subsume the actual-injury inquiry into the separate question of when the client discovered or should have discovered the alleged negligence, we directly contradict the language of section 340.6. Similarly, in the Indiana intermediate appellate court case of Basinger v. Sullivan (Ind.Ct.App. 1989) 540 N.E.2d 91, 93, also cited by the majority, the court stated: "By its terminology the statute [of limitations] commences to run when the cause of action is complete.

Contrast the foregoing with our

statute. A cause of action for legal malpractice, like any negligence action, requires negligence, causation, and damages. Yet the presence of those three elements alone does not cause the statute of limitations in section 340.6 to run. A fourth element, actual injury, above and beyond the substantive requirements of the tort, is required. Thus, the analyses in the intermediate appellate courts in Illinois and Indiana fall short of what is required in California.

Other cases relied on the majority also construe statutes distinguishable from our own. For example, in Hayden v. Green (1988) 431 Mich. 878 [429 N.W.2d 604], the statute began running when the attorney no longer represented the client or when the client discovered the claim. In Jankoski v. Taylor, Bishop & Lee (1980) 246 Ga. 804 [273 S.E.2d 16, 18],

the statute began running at the earliest date on which the client could have brought the malpractice suit, i.e., when the elements of the tort had been met. Both these statutes lack the element essential to this California case: actual injury.

Further contrary to the majority's contention, out-of-state interpreting statutes of limitation in the manner I propose do not rest their holding on continued representation of the client by the allegedly negligent attorney. For example, in Amfac Distribution Corp. v. Miller (1983) 138 Ariz. 155 [673 P.2d 795, 796-799], the court cited numerous reasons for holding that the limitation period did not start running until the pending appeal had been resolved, and did not explicitly limit its holding to situations in which the same attorney

pursues the appeal.

Construing the Statute Consistently With Precedent and Policy

As we have seen, the plain language of the statute and its history provide guidance but do not authoritatively define "actual injury." It is therefore appropriate to construe the statute to effect the ostensible legislative purpose (Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal.3d 1072, 1078-1079 [282 Cal.Rptr. 445, 811 P.2d 737]) of furthering the policies underlying statutes of limitations: i.e., judicial economy, avoiding stale claims, and fairness to the parties.

The separate requirements of discovery and actual injury found in section 340.6 promote judicial economy. Rather than forcing a client to file a malpractice action whenever the attorney

falls below the standard of competent counsel, the statute allows the client to wait until the attorney's mistakes cause some palpable harm, i.e., until they result in a lost case. Without the actual injury requirement, a litigant would have to file malpractice actions before knowing the ultimate result-a possible favorable outcome to the litigant despite the attorney's malpractice.

I apply this logic to the situation at hand. To force malpractice plaintiffs to file their actions before they know the outcome of the case upon which their claim is based does not promote judicial economy. The status of the malpractice claim is uncertain until the appeal in the underlying case is resolved, because it is ultimately decided in the client's favor the malpractice suit may well

become moot for lack of damages.[2] The majority's analysis defies rationality with its fictional scenario of a client who files a malpractice action against an attorney after winning the underlying lawsuit: this would be a rare situation indeed.

My resolution of the conflict is consistent with the other policy considerations behind section 340.6.

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[2]The majority's construction of the statute may also interact with "fast tract" trial procedures to threaten potential havoc. Appeals require many months and often years to prepare the record, compete the briefing, hear arguments, and reach a decision. The "fast track" trial procedures adopted by a number of counties could result in a judgment obtained against the attorney in the malpractice action before the appeal in the underlying case is decided; if that appeal is successful, it alters the very foundation of the malpractice judgment. A practical reading of the statute would prevent this topsy-turvey turn of events.

To await the result of a pending appeal will not lead to stale claims because of the circumstances under which the limitation period will be tolled are limited. First, as in Turley v. Wooldridge, supra, 230 Cal.App.3d 586, Even though an appeal of right may be available it does not toll the statute unless the litigant actually pursues the appeal. This prevents a client from causing the limitation period to be indefinitely tolled by deferring pursuit of remedies, a concern expressed in Worton v. Worton, supra, 234 Cal.App.3d at page 1652. Second, the limitation period is not tolled if there is no appeal of right, as in Troche v. Daley, supra, 217 Cal.App.3d 403, the case in which the client attempted to appeal in forma pauperis under federal law.

The third policy consideration, fairness to malpractice plaintiffs, is also furthered by my construction of the statute. It is impractical to require a client simultaneously to pursue two lawsuits: a malpractice action and an appeal of right. The present case illustrates the dilemma. Here plaintiff pursued her appeal without the aid of counsel, requiring an enormous effort to understand the statutes and rules governing appeals. To compel her simultaneously to prosecute a malpractice suit would be unduly burdensome. The situation is different, however, if the client has an appeal of right but does not pursue it; then her decision not to appeal implies that she considers the judgment of the trial court final.

The majority's contentions fail to persuade otherwise. They parade their

"horribles," arguing that memories will fade and witnesses die while malpractice plaintiffs pursue appeals. However, the dangers associated with delay are greatly lessened by the very nature or legal malpractice cases. As one court declared in resolving the present issue: "Unlike medical malpractice or other forms of malpractice which do not occur in the course of litigation, [legal malpractice] generally is memorialized in court pleadings or in hearing transcripts... [T}he dangers associated with delay are lessened because a record will have been made of the actions which form the substance of the later malpractice action." (Amfac Distribution Corp. v. Miller, supra, 673 P.2d at p. 798.)

The present case illustrates the validity of this observation: a client in Laird's position may rely on legal

records to show when she engaged defendants as her attorneys and what they did to pursue the lawsuit. The client may then ask the trier of fact to compare this performance with expert testimony stating what a reasonably diligent attorney would have done. The attorneys may respond with their own expert witness, but the heart of the matter is the legal records that show, for example, when depositions were taken and motions were made. Such formal written evidence will not become stale pending resolution of an appeal in the underlying case.

Further, although the majority correctly point out that some harm is caused by the mere fact that an adverse judgment is entered regardless of what happens on appeal, the various harms they cite cannot be considered "actual

injury." Consistent with policy reasons discussed above, especially judicial economy, I would reject the dictum in Budd v. Nixen, supra, 6 Cal.3d at page 202, suggesting that substantial harm is suffered by the ordinary expenses that appellants incur to maintain an appeal, such as paying filing and transcript fees and posting a bond; whether such harm is relatively de minimis, or is indeed suffered at all, cannot be determined until the appeal is concluded because these expenses may be recouped by the prevailing party on appeal. (Cal. Rules of Court, rule 26.)

Nor is the reduced settlement value of a case decided adversely in the trial court enough to satisfy the actual injury requirement; if and when the case is actually settled, there is actual injury because the settlement represents the

litigant's agreement to forgo further remedies. Finally, any added emotional distress caused by the adverse judgment, even if compensable in a malpractice suit when certain requirements are met, is not actual injury. A client may suffer emotional distress whenever the attorney makes a mistake, added distress cannot be the yardstick by which actual injury is measured.

Thus based on the language of the statute, on legislative history, on case law, and on practicality, I am convinced the majority err in holding there is actual injury while the client yet awaits the resolution of an appeal of right she has actually pursued. Because Ms. Laird filed her malpractice action within one year of dismissing her appeal, I would hold that her malpractice action was timely.

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

JERI EMMET LAIRD, Plaintiff and Respondent, v. SIDNEY G. BLACKER, as Administrator, etc. et. al Defendants and Appellants.	S021074 (Ct.Appeal No.B037429

MODIFICATION OF OPINION

BY THE COURT

The opinion herein, appearing at 2 Cal.4th 606 is modified as follows:

At the end of the third sentence of the first full paragraph on page 610 add "and Barry Post"; and

2) In the fourth sentence of the first full paragraph on page 610 change "the present defendants" to "Sidney G. Blacker and Samuel Z. Winnikoff, aka Winnikoff & Associates."

This modification does not affect the judgment of the case.

ATTORNEYS

Appeal of Mishandled Case Doesn't Toll Statute of Limitations for Malpractice

Cite as 91 Daily Journal D.A.R. 4151

JERI EMMET LAIRD,
Plaintiff-Respondent,
v.
SIDNEY G. BLACKER, As Administrator, etc., et al.,
Defendants-Appellants.

No. B 037429
Super.Ct. No. C 453404
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION ONE

FILED APRIL 10, 1991

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Lopez, Judge. Reversed and remanded with directions.

Horvitz & Levy, Ellis J. Horvitz, and Frederic D. Cohen, for defendants and Appellants.

Francis C. Pizzulli, for Plaintiff and Respondent.

We are asked in this case to decide whether the pendency of an appeal from an adverse judgment tolls the statute of limitations in a subsequent legal malpractice action against the attorney whose wrongful conduct was the cause of the adverse judgment. We hold that it does not.

FACTS

The relevant facts are not disputed. On March 8, 1977, Jeri Emmet Laird, a television writer, sued Spelling-

Goldberg, a television production company, claiming that her story ideas and characters had been plagiarized by Spelling-Goldberg and developed into the television series "Family." Laird's complaint was not filed in propria persona.

In May 1977, Laird retained Berg & Spire to prosecute her lawsuit. In three years,the only thing that firm did was to effectuate service of the complaint.

During the Summer of 1980, Laird retained Barry Post and the Law Offices of Samuel Z. Winnikoff's office filed an at-issue memorandum, served interrogatories on Spelling-Goldberg and scheduled Aaron Spelling's deposition.

In August 1981, Spelling-Goldberg filed a motion to dismiss Laird's case for want of prosecution. On October 20, 1981, the trial court granted the motion

and an order of dismissal was filed. Laird could not afford the $4,000 Post requested to pursue an appeal from the dismissal and on December 7, 1981, she discharged Post and Winnikoff, substituted herself in propria persona, and filed a notice of appeal. On September 15, 1982, Laird settled her claims against Spelling-Goldberg for $1,000 and dismissed her appeal.

On May 17, 1983, nineteen months after her action against Spelling-Goldberg was dismissed and seventeen months after Post and Winnikoff were discharged, but only eight months after she dismissed her appeal from the order of dismissal, Laird sued Berg & Spire and Barry Post for legal malpractice. In February 1986, Laird amended her complaint to add Samuel Z. Winnikoff as

an additional defendant.[1]

In January 1987, Laird filed a second amended complaint. Post and Winnikoff demurred, asserting that Laird's cause of action had accrued on October 20, 1981 (the date her underlying case was dismissed), that the statute of limitations started running on

[1] By that time, Winnikoff had died, Laird actually named Winnikoff's law practice as "Doe 1," and Sidney Black, administrator of Winnikoff's estate, as "Doe 2." For brevity and clarity, we refer to these defendants jointly as "Winnikoff."

December 7, 1981 (the date Laird discharged Post and Winnikoff)[2] and that Laird's action was therefore barred by the applicable statute of limitations, section 340.6. Laird opposed the demurrers, asserting that her cause of action had not accrued until she dismissed her appeal on September 15, 1982. The trial court overruled the demurrers.

Laird settled with Berg & Spire for $50,000 and proceeded to trial against Post and Winnikoff. Posts' and Winnikoff's motions for nonsuit on

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[2] There is no issue in this case concerning subdivision (a)(2) of section 340.6 of the Code of Civil Procedure, which tolls the statute of limitations during the time an allegedly negligent attorney continues to represent the client.

Unless otherwise noted, all section references are to be Code of Civil Procedure.

statute of limitations grounds were denied and the jury returned a verdict in favor of Laird for approximately $1.7 million. Post's and Winnikoff's motions for judgment notwithstanding the verdict, once again asserting the bar of limitations, were denied and this appeal followed. We reverse, concluding that, as a matter of law, Laird's claims against her former attorneys were barred limitations.

DISCUSSION

I.

In broad terms, the rule today is that the statute of limitations for a cause of action for legal malpractice does not accrue until the client suffers damage and discovers, or should discover, the facts essential to his or her claim, whichever occurs later. As will appear, it is the application of this rule

of this rule and not its articulation which poses the problem. We therefore begin our discussion by examining the origin of the rule and the manner in which it has been applied.

A.
THE OCCURRENCE RULE

In Hays v. Ewing (1886) 70 Cal. 127, the plaintiff filed suit in 1884, alleging that his attorney's negligence had resulted in the dismissal of his collection suit in November 1881. Our Supreme Court held that the malpractice action was barred by the two-year limitations period of former section 339.

Eighty-five years later, in Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, the Supreme Court explained what happened when Hays got into the hands of the publisher. "Since the dismissal in the collection suit

occurred two and one-half years before the institution of the malpractice action, clearly the two-year limitation of section 339 barred any cause of action based on negligent conduct which occurred prior to the dismissal. Obviously this court accepted the date of dismissal of the suit -- that is, the date upon which the client suffered damage -- as the crucial point from which the statute of limitations should run. Indeed, the court refused to adopt as the critical time the date of the affirmance of the dismissal on appeal. Nevertheless, the publisher's headnote summarized the holding as follows: 'a cause of action against an attorney for neglect of duty in the management of an action is barred at the expiration of two years after neglect occurred'... We search in vain within the body of the opinion or within the facts

of the case for any justification for the publisher's note. Yet this unwarranted headnote generated the peculiar rule that only in legal malpractice cases does the statute of limitations begin to run before damage and before discovery." (Id. at p. 183, first emphasis added.)[3]

B.
THE "IRREMEDIABLE DAMAGE" RULE

The occurrence rule was on the back burner between 1886 and 1935 (there were

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[3] The publisher's condition appears to have been contagious. Contrary to the statement in Neel, the court in did not refuse "to adopt as the critical time the date of the affirmance of the dismissal on appeal." It never got that far. What the court said was that "[t]he complaint herein avers that the plaintiff, subsequent to and within one year after the judgment in [the underlying case], demanded of the defendant herein that he should take an appeal on behalf of the plaintiff in that action. [ ] But the facts stated in this complaint show that an appeal would have been of no avail. [ ] Judgment affirmed." Hays v. Ewing, supra 70 Cal. at p. 128; emphasis added.)

only five cases discussing the problem for almost 50 years)[4] and then off the stove altogether for the next 29 years, during which time there were no published appellate decisions discussing the period of limitations for legal malpractice. During that same time, however, the courts held that in medical malpractice actions the period of limitations does not begin until discovery, and the discovery rule was then extended to other professions.

In legal malpractice actions, our courts nevertheless adhered to the occurrence rule, consistently holding (without apology or analysis) that the

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[4] Hays v. Ewing, supra 70 Cal.127; Lally v. Kuster (1918) 177 Cal.783; Jensen v. Sprigg (1927) 84 Cal.App 519; Wheaton v. Nolan (1934) 3 Cal.App.2d 401; and DeGarmo v. Luther T. Mayo, Inc. (1935) 4 Cal.App.2d 604.

statute ran not from the date of discovery but from the date the negligent act occurred, notwithstanding that claims were sometimes lost before their existence was known. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra 6 Cal.3d at p. 185; see also Griffith v. Zavlaris (1963) 215 Cal.App.2d 826; Yandell v. Baker (1968) 258 Cal.App.2d 308; Alter v. Michael (1966) 64 Cal.2d 480.)

The problem created by the occurrence rule first received serious attention in Heyer v. Flaig (1969) 70 Cal.2d 223. In Heyer, Doria Kilburn retained Joseph Flaig to prepare her will and instructed Flaig that her entire estate was to pass to her two daughters. She also told Flaig that she was about to be married. Flaig prepared a will and Kilburn executed it on December 21, 1962.

On December 31, 1962, she was married. The will left everything to Kilburn's daughters but failed to mention Kilburn's new husband. Id. at p. 225.)

On July 9, 1963, Kilburn died. Her husband claimed a portion of the estate, asserting that he was a post-testamentary spouse. At some point after December 21, 1964, Kilburn's daughters sued Flaig, alleging he had negligently failed to advise their mother of the consequences of a post-testamentary marriage and, subsequent to Kilburn's marriage and up to the time of her death, negligently failed to advise her of the consequences of omitting from the will any mention of her husband's inevitable claim. (Id. at pp. 225-226.)

Flaig's demurrer was sustained without leave to amend, on the ground that the action was filed more than two

years after the commission of the negligent act (the drafting of the will). The Supreme Court reversed, holding that Flaig's duty to Kilburn's daughters extended "beyond the date of the original drafting of the will when the attorney's negligent acts created a defective estate plan upon which the client might rely until her death. The duty effectively to fulfill the desired testamentary scheme continued until [Kilburn's] death, when [Kilbrun's] reliance became irrevocable. Because [Flaig] owed [the daughters] this continuing duty the cause of action did not accrue nor the statute of limitations commence to run until [Flaig's] negligence became irremediable."[5] (Id. at p. 230; emphasis added.)

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[5] This was the Supreme Court's first step into the minefield of "irrevocable" and "irremediable" damage, and the origin of the problem we address in this case.

The result is not surprising since adoption of any other rule in Heyer would have meant that the only beneficiary who could recover "would be one whose testator had died and who could file a complaint prior to two years after the drafting of the will or after the occurrence of some other original negligent act." (Id. at p. 231.) The court refused to adopt this "absurd proposition," notwithstanding that, at the time Heyer was decided, the occurrence rule would have barred an action by Kilburn against Flaig had she lived and discovered the problem at

the time her daughters filed suit.[6] (Id. at pp. 231-233.)

C.

THE RULES OF "DISCOVERY" AND "APPRECIABLE DAMAGE"

In Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra 6 Cal.3d 176, 179, the Supreme Court corrected the publisher's error in Hays v. Ewing, holding that the statute of limitations for legal malpractice, as for all professional malpractice, starts to run when the client discovers, or should

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[6] In 1977, section 340.6 was adopted as California's first statute of limitations drafted expressly to apply to legal malpractice actions (See Part III, post.) Subdivisions (b) of section 340.6 addresses the Heyer v. Flaig problem: "In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event."

reasonably discover, his cause of action. In the companion case of Budd v. Nixen (1971) 6 Cal.3d 195, 198, the Supreme Court held that a cause of action for legal malpractice does not accrue until the client suffers damage. Read together, Neel and Budd hold that the statute of limitations for a cause of action for legal malpractice does not accrue until the client suffers damage and discovers, or should discover, the facts essential to his or her claim, whichever occurs later.[7]

In Neel, the Supreme Court recognized that adoption of a "date of discovery rule" would impose an increased

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[7] The date of discovery is not an issue in this case. Laird was in court when her case was dismissed and she believed as of that date that Post and Winnikoff had negligently handled her case.

burden on the legal profession because the attorney's error might not "work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect. On the other hand, when an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession."[8] (Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra, 6 Cal.3d at p. 192)

In Budd v. Nixen supra, 6 Cal.3d

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[8] The Court recommended and the Legislature ultimately adopted an outside limit on liability. (Id. at pp. 192-193; section 340.6, subd. (a).

194, 199, the Supreme Court "deal[t] with a situation in which the client contends that although he discovered his attorney's negligence, he had not, at that time, suffered consequential damages; hence, at that date he did not have an accrued cause of action for professional negligence." Budd holds that if the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. "Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice... ~It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred"... [ ] The cause of action arises, however, before the client sustains all, or even

the greater part, of the damages occasioned by his attorney's negligence. [Citations.] Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue. [ ] Indeed, once having discovered his attorney's negligence and having suffered some damage, the client must institute his action within the time prescribed in the statute of limitations or he will be barred from thereafter complaining of his attorney's conduct." (Id. at pp. 200-201, emphasis added.)

The Court explained that this issue would arise only in unusual cases: "Ordinarily, the client has already suffered damage when he discovers his attorney's negligence, as occurred in Neel... In other cases, the infliction of the damage will alert the client to the

attorney's negligence and thus the statute of limitations will then begin to run on any malpractice action. Only in the unusual case will the client discover his attorney's negligence without having suffered any consequential damage." (Id. at p. 201.)

Addressing the particular facts of the case before it -- where the plaintiff in the malpractice action was a defendant in the underlying case who suffered an adverse money judgment against him and who might or might not incur attorney's fees on appeal from that judgment, the Supreme Court concluded that even if Budd's malpractice action "had not earlier accrued, it at least matured on entry of judgment because he clearly then became obligated to pay a considerable sum to the broker to post a bond on appeal." (Id. at p. 202.)

Taken at face value, this language supports a conclusion that an appeal does not extend the period of limitations, at least in the factual context of Budd. Where, however, the malpractice occurs in the course of representing a plaintiff, there is no risk of execution and not need to post a bond. There may or may not be attorney's fees incurred lost interest or other expenses.

In our view, the timeliness of a legal malpractice action ought not to turn on whether the client happened to be a plaintiff or a defendant in the underlying action. We believe the Supreme Court at least implicitly agreed and recognized that adoption of the discovery rule eliminated the Heyer requirement of "irremediable" damage since Budd speaks only of "appreciable harm" and neither

Budd nor Neel use the word "irremediable." As we explain in Part III, post, we believe the Legislature similarly agreed and drafted section 340.6 consistent with this view. But before we review the legislative history of section 340.6, we jump ahead to examine the cases decided after adoption of the statute, if for no other reason than to demonstrate the inconsistencies in those decisions and the reason for our departure from the accepted approach to this problem.

II.
THE CASES DECIDED AFTER ENACTMENT OF SECTION 340.6

In 1977, the Legislature enacted section 340.6. (Stats. 1977, ch. 863, section 1.) Then and now, subdivision (a)(1) of section 340.6 provides that "[a]n action against an attorney [for

malpractice] shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the [malpractice], or four years from the [malpractice], whichever occurs first[,]...except...the period [for commencement of legal action] shall be tolled during the time that... [t]he plaintiff has not sustained actual injury..."[9]

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[9] Section 340.6, in its entirety, provides that:

"(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

"(1) The plaintiff has not sustained actual injury:

Several years went by before the courts were called upon to examine section 340.6 in a context relevant to the issue now before us. In the first case, Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal.App.3d 417, 432, the Fourth District assumed the "irremediable" rule of Heyer had to be

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"(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

"(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney; except that this subdivision shall toll only the four-year limitation; and

"(4) The plaintiff is under legal or physical disability which restricts the plaintiff's ability to commence legal action.

"(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

read into the word "actual" in subdivision (a)(1) of section 340.6.

In a malpractice action by a client who was a plaintiff in an action to recover payment for construction work. Southland holds that "[a] client suffers damage when he is compelled, as a result of the attorney's error, to incur and pay attorney's fees and legal costs and expenditures.) Budd v. Nixes, supra, 6 Cal.3d 195, 201.) The statute of limitations commences to run when a cause of action accrues, i.e., when the error becomes irremediable and the impact of the injury occurs. (Heyer v. Flaig (1969) 70 Cal.2d 223, 225...) (Southland Mechanical Constructors Corp. v. Nixen,

supra, 119 Cal.App.3d at pp.432, emphasis added.)[10]

In the next case, Bell v. Hummel (1982) 136 Cal.App.3d 1009, Division Three of our District held that "[e]ven after knowing of a wrongful act, if there is not actual irremediable damage, there is no running of the statute of limitations... [ ] ...It is not necessary that all or even the greater part of the damages have to occur before the cause of action arises. It is sufficient if [a]ny appreciable and actual harm flowing from

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[10] Southland holds that in an action by a subcontractor against its attorney for failing to pursue a claim against the government which had been assigned to the subcontractor by the general contractor, the statute of limitations starts to run when, by failing to pursue an appeal, the subcontractor lost its rights against the government, and that the statute was not tolled while the subcontractor continued to pursue its remedy against the general contractor.

the attorney's negligent conduct' has occurred"[11] (Id. at p. 1016, emphasis added.)

In the third case, Robinson v. McGinn (1987) 195 Cal.App.3d 66, 72, Division Seven of our District held that harm does not become "irremediable" until the client has exhausted his administrative remedies. According to Robinson, "the statute of limitations on a legal malpractice action does not begin to run until the lawyer's negligence which caused the harm becomes irremediable." (Id. at p. 73, emphasis added.) More specifically, "harm is

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[11] Bell holds that a trial court order denying a husband's motion to join with his wife as a plaintiff in a medical malpractice case is actual damage to the husband and starts the statute running as to his subsequent legal malpractice claim against the attorney who failed to include him as a plaintiff in the first instance.

'actual and appreciable' only if and when it becomes 'irremediable' [and] 'irremediable,' by definition means something which is impossible to remedy; something which is lost or incorrigible."[12] (Id. at p. 74, emphasis added.)

In the fourth and most recent case, Troche v. Daley (1990) 217 Cal.App.3d 403, the Fourth District upheld a summary judgment granted on statute of limitations grounds. The facts are strikingly similar to those in the case before us. Brandy Troche filed a lawsuit in federal district court. That action was dismissed on May 15, 1984, for

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[12] Robinson holds that an administrative appeal from a public entity's decision to terminate an employee tolls the statute of limitations in a legal malpractice action against the attorney whose negligent advice resulted in the employee's termination.

failure to timely serve a defendant, and on June 28, 1984, Troche filed a notice of appeal. On March 1985, the federal court denied Troche's request to appeal in forma pauperis because the court was unable to certify the appeal as not frivolous. On August 26, 1985, Troche sued her former attorney. (Id. at p. 406.)

The court framed the issue, and answer thus: "[When did Troche suffer actual harm: Was it May 15, 1984, when the federal suit was dismissed or was it, as Troche argues, March 18, 1985, when the district court denied Troche's request to appeal in forma pauperis? ... [ ] We find the harm occurred on May 15, 1984, when the district court dismissed the lawsuit. While [the attorney's] alleged negligence occurred in 1981 -- when he failed to serve the appropriate

federal entities -- Troche did not suffer injury from that negligence until her lawsuit was dismissed."[13] (Id. at p. 410.)

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[13] (See also Ruchti v. Goldfein (1980) 113 Cal.App.3d 928, 935 [holding that a client whose attorney permitted a judgment dissolving her marriage to be entered without protecting her interest in her husband's military pension was damaged when the judgment in the dissolution proceeding became final, not at the later date on which the husband's right to receive the pension vested]; Bledstein v. Superior Court (1984) 162 Cal.App.3d 152, 170 [stating the rule as "appreciable harm"] Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1164 [appreciable and actual damage"]; Goebel v. Lauderdale (1989) 214 Cal.App.3d 1502, 1507 ["irremediable harm"], McKeown v. First Interstate Bank (1987) 194 Cal.App.3d 1225, 1231 ["irremediable error"]; Johnson v. Haberman & Kassoy (1988) 201 Cal.App.3d 1468, 1474 ["irremediable" harm]; In re Easterbrook (1988) 200 Cal.App.3d 1541, 1544 ["appreciable and actual harm"].)

These cases illustrate the problem in fixing an accrual date in situations where further trial court motions or an appeal are pursued, notwithstanding that the injury does not temporarily disappear or become suspended because a more final adjudication of the result is sought. (Richards Enterprises, Inc. v. Swofford (Fla. 1986) 495 So.2d 1210, 1216 (dis. opn. of Cowart, J.) ["Appellate review in civil cases can correct judicial error, but an appeal does not eliminate a trial lawyer's negligence nor does it extinguish a client's cause of action against an attorney for negligence in the conduct of a trial" 1;see also 2 Mallen & Smith, Legal Malpractice (3d ed. 1989) section 18.11, p. 111.) They also illustrate the problem the Legislature thought it solved with the adoption of section 340.6.

III.
FAREWELL TO THE CONCEPT OF "IRREMEDIABLE"

When the Legislature adopted section 340.6 in 1977, it codified the discovery rule of Neel and the "actual" damage rule of Budd (but not Budd's "appreciable harm" standard) and implicitly rejected the "irremediable" rule of Heyer. Unfortunately, the Courts of Appeal have adhered with the tenacity of Velcro to the idea that the damage incurred must in every case be "irremediable" before the statute starts to run. In our view, the correct analysis compels a different approach.

A
THE LEGISLATURE KNEW ABOUT HEYER, NEEL AND BUDD

Heyer was decided in 1969, at which time the occurrence rule was alive and well and required that a legal malpractice action be file within two

years following the negligent act. To prevent a manifest injustice in the case of a testator who did not die within two years after the negligent act, the Supreme Court adopted the "irremediable" rule, holding that the period of limitations did not start to run until the date on which it was no longer possible to correct the negligent act. Death of a testator is the ultimate example of irremediable injury.

Neel and Budd were decided in 1971. Neel abolished the occurrence rule and adopted the discovery rule, thereby eliminating the problem the court had faced two years earlier in Heyer. Budd addressed the situation where the client discovered the attorney's negligence but had not, at the time of that discovery, suffered "consequential damages, and held that a claim based on an attorney's

negligence does not accrue until the client suffers "appreciable harm as a consequence of his attorney's negligence." (Budd v. Nixen, supra 6 Cal.3d at p. 200.) The word "irremediable" does not appear in to the contrary, Budd holds that "[t]he cause of action [for legal malpractice] arises... before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence... Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue." (Id. at p. 201.)

Clearly, the Supreme Court recognized that adoption of the discovery rule eliminated the reason for the "irremediable" rule. Application of the discovery rule to shows that there is no

reason to consider when the injury caused by Flaig's negligence became irremediable -- because Kilburn's daughters would not have discovered the negligence until after their mother died, their cause of action would not have arisen until the date of discovery and the statute would have run from that date. although Legislature apparently understood this analysis, it has not been considered by the courts since the enactment of section 340.6.[14]

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[14] See 2 Mallen & Smith, Legal Malpractice, section 18.11, pp. 110-111: "Some decisions erroneously have rationalized tolling a statute of limitations because of lack of damage.' Usually, the more appropriate analysis concerns the inability of the client to discover either the attorney's negligence or its consequences. Such decisions are a reaction to the unfairness of the occurrence rule and are unnecessary in a discovery rule jurisdiction." (Emphasis added.)

B.
ASSEMBLY BILL NO. 3068

On February 13, 1976, Assembly No. 3068 was introduced by Assemblyman Brown, to add a new section 340.6. It was short and sweet: "In any action for damages against an attorney based upon the attorney's alleged professional negligence, the time for the commencement of action shall be three years after the date of the negligent act or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the damage, whichever first occurs. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (a) upon proof of fraud; or (b) intentional concealment." By the end of the year, Assembly Bill No. 3068 was withdrawn without formal action.

(I)Assem. J. (1975-1976 Reg. Sess.) p. 21862.)

C.
THE MALLEN PROPOSAL

In early 1977, Ronald E. Mallen, who is perhaps the preeminent expert on the subject of legal malpractice, published an article entitled Panacea or Pandora's Box? A Statute of Limitations for Lawyers (52 Cal.State Bar J. 22), proposing a statute to address the legal malpractice insurance crises evidenced by the "enormous increase of insurance premiums...accompanied by a dramatic decline in the number of companies willing to insure attorneys." (Id. at p. 22.) His statute, he hoped, would achieve the dual goals of (1) limiting liability in legal malpractice cases while at the same time (2) maintaining the integrity of the attorney-client relationship. (Id.

at p. 24.) His draft reflects the skeleton of what ultimately became section 340.6:

"An action against an attorney for a wrongful act of omission, other than for actual fraud or breach of a written contract, arising in the performance of a professional services shall be commenced within two years from the date the plaintiff discovers or through the sue of reasonable diligence, should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. [ ]The accrual of the cause of action shall be tolled for the time druing which any for the following subsist: [ ] 1.The plaintiff has not sustained significant injury; [ ] 2. The attorney continues to represent the plaintiff regarding the

specific subject matter in which the alleged wrongful act or omission occurred; [ ] 3. The attorney wilfully fails to disclose the facts constituting the wrongful act or omission when such fact are known to the attorney, except that this subdivision shall toll only the four-year limitation." (**Id.** at p. 24, emphasis added.)

Mr. Mallen explained that the tolling provisions "are important not only for the client but also for the attorney and the judicial process. Thus, the plaintiff should not be required to sue until he sustains significant damage. To do otherwise is to outlaw causes of action before remedies may exist or to promote unnecessary litigation." (**Ibid.**) In footnotes to these comments, Mr. Mallen cites **Budd** for the proposition that the client should not have to sue

until he sustains "significant damage" and Heyer to explain that it "would be unfair to cut off a cause of actin by a statute of limitations before a remedy existed." (Id. at p. 24, fns. 16, 17.)

D.
ASSEMBLY BILL NO. 298

On January 25, 1977, Assembly Bill No. 298 was introduced by Assemblyman Brown, to add a new section 340.6.15. As originally drafted, Assembly Bill No. 298 changed the period of limitations to "three years after the date of the negligent act or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the damage, whichever first occurs. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud; or

(2) intentional concealment."

Noticeably absent was any reference to the existence of injury, actual, appreciable, significant or otherwise. The bill did include two other interesting provisions: "(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event. [ ] (c) Any decrease in cost to an insurer resulting from the effect of the enactment of this section in insuring against professional negligence shall be passed on the individuals insured against professional negligence."

Subdivision (b) was obviously intended to address the testamentary problem of Heyer and similar problems in

contingent contracts. Subdivision (c) was obviously the product of someone's daydream. Sometime after the original bill was introduced and prior to its first amendment, the author of Assembly Bill No. 298 obtained and considered Mr. Mallen's article and proposed statute.[16]

Although the pass-through of insurance costs might have been unrealistic (see, e.g., Report of the Senate Committee on Judiciary on Assem. Bill No. 298, as amended May 17, 1977, p. 4 [HOW IS THIS PROVISION TO BE ENFORCED?"]), the more pragmatic and overriding purpose of the bill was "to reduce the costs of legal malpractice insurance." (Id. at p. 1; see also

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[16] A Bill Digest prepared by the Assembly Committee on Judiciary for a March 24, 1977, hearing date refers to prior distribution to the Committee of Mr. Mallen's article. (See Honey Spring Homeowners Assn. v. Board of Supervisors

Assenbly Brown's "Fact Sheet" re Assem. Bill No. 298, March 25, 1977 (noting that the bill would hopefully make malpractice insurance easier to obtain and also reduce and thus stabilize fees]; and see Southland Mechanical Constructors Corp. v. Nixen, supra, 119 Cal.App.3d at p. 429.)[17]

Assembly Bill No. 298 was amended in the Assembly on May 9, 1977, by a complete rewrite of subdivision (a): "An action against any attorney for a

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(1984) 157 Cal.App.3d 1122, 1136-1137; Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.App.ed 211, 219.)

[17] In the article accompanying his proposed statute, Mr. Mallen explained: "Legal malpractice is a subject of increasing concern to attorneys. Although the most direct exposure is being named as a defendant, almost equally disturbing is the annual experience of renewing professional liability insurance... The enormous increase of insurance premiums has been accompanied by a dramatic decline in the number of companies

wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years unless tolled during the time that any of the following exist: [ ] (1) The plaintiff

has not sustained significant injury;[18] [ ] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [ ] (3) The attorney willfully fails to disclose the facts constituting the wrongful act of omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitations; and [ ] (4) When circumstances beyond the plaintiff's control, such as incarceration or confinement to a mental facility, exist." Subdivisions (b) and (c) remained unchanged.

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willing to insure attorneys." (Mallen, Panacea or Pandora's Box? A Statute of Limitations for Lawyers (1977) 52 Cal.State Bar J 22.)

[18] Clearly, the word "significant" came from Mr. Mallen's proposed statute.

On May 17, 1977, Assembly Bill No. 298 was again amended in the Assembly. Aside from stylistic changes, the only meaningful amendment was to subdivision (a)(1) by deleting "significant" and substituting "actual" so that the four-year period would be tolled when the plaintiff "has not sustained actual injury." The only other change was to subdivision (a)(4), to provide that the

statute would be tolled when the "plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

The final amendment to Assembly Bill No. 298 was by the Senate on August 17, 1977, the inevitable deletion of the insurance savings pass-through of subdivision (c). The bill was thereafter

passed by the Senate and the Assembly, approved by the Governor, and chaptered (Stats. 1977, ch. 863.)

Subdivision (b) was not a part of Mr. Mallen's proposed statute. To us, it appears that the Legislature included subdivision (b) to prevent the Heyer problem and thereby eliminated the "significant" requirement of Mr. Mallen's proposed statute. By providing that the period of limitations does not start running until the future event occurs when he action is based upon an instrument in writing contingent upon a future act or event, the Legislature ensured that the attorney who negligently drafts a will or a contract cannot escape liability in the fortuitous event that the contingent act occur' outside the period of limitations. It follows that

"significant" was not needed in subdivision (a)(1) and that it was deleted to avoid a construction that would reincorporate the old "irremediable" standard.

E.
WELCOME TO "ACTUAL INJURY"

The next question, therefore, is what is "actual" injury? We know what it is not -- it need not be "irremediable" to be actual, nor need it be "significant" to be actual. It follows that in this context, "actual" means objectively existing and not feigned or merely speculative, real and not imagined. (See Black's Law Dict. (5th ed. 1979) p. 33.) To us, this means that the injury must be objectively verifiable and not dependent upon the subjective description of the injured person. Asked differently, the question is whether we

can say that, as of the relevant date, a reasonable person would have considered the injury to be real.[19]

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[19] See 2 Mallen & Smith, Legal Malpractice, supra, section 18.11, pages 103, 105. "The damage rule ameliorates much of the unfairness of the occurrence rule. Unfortunately, the cure does have some side effects in creating uncertainties regarding the existence and date of damage. Those uncertainties may require the attorney defendant to bear the full expense and strain of an unwarranted trial. [ ] ...[In the drafting of section 340.6, California] addressed the issue of the amount.' of damage necessary to commence accrual of the statute. In the legislative proposal, the 'appreciable and actual' test of Budd v. Nixen was replaced by 'significant' injury, but the final statutory enactment required only 'actual damage. The change was motivated by pragmatic reasons rather than favoritism for lawyers. For statute of limitations to effectively preclude litigation of stale claims, the inquiry of damage should not invariably raise an issue of fact subjecting the lawyer to uncertainty and the expense of litigating both the merits of the claim and statute defense... The California approach reduces the hazard of its statute creating factual issues for litigation by focusing upon the damage rather than upon the amount." (First emphasis added.)

To attempt to quantify damage or injury pending an appeal necessarily results in a distinction between plaintiffs and defendants and a contest about whether a particular expenditure is sufficient to trigger the limitations period. For example, a defendant who suffers an adverse judgment because of an attorney's wrongful act or omission will usually be forced either to pay the judgment or post a bond pending appeal, and attorney's fees and costs will probably be incurred. But what if the client's assets are safe from execution and no bond is posted? What if the attorney does not charge for the appeal (a possibility that is not remote if the attorney hopes to correct his own mistake)? What about a plaintiff? If the underlying case was one the attorney undertook on a contingent basis, the

attorney may be obligated to pursue the appeal on the same basis and also to advance costs. If the client (plaintiff or defendant) advances the costs necessary for preparation of the record on appeal, is that enough? What amount of fees or costs is enough?

To avoid these and similar philosophical debates about the decibel level of trees falling in unpopulated forests, the Legislature used "actual" to focus the fact of damage and eliminated all qualifiers to prevent consideration of the amount of damage.

F.

ACTUAL INJURY OCCURS UPON ENTRY OF AN ADVERSE JUDGMENT OR FINAL ORDER IN THE TRIAL COURT AND AN APPEAL DOES NOT DEFER THE DATE OF ACCRUAL

In our view, an interpretation of section 340.6 which requires an artificial distinction based on pure happen-stance is contrary to both common

sense and the intent of the Legislature. We believe the Legislature used "actual" injury intentionally, and deviated from "irremediable" and "significant" to provide a more certain test of damages than the prior court-adopted criterion. Stated otherwise, the Legislature rejected the inquiry mandated by Budd, which focused on the extent rather than the fact of damage, and fashioned a statute which focuses instead "on whether the [client] sustained any detectable damage," emphasizing the fact of damage rather than its extent. (Mallen An Examination of a Statute of Limitations

for Lawyers (1978) 53 Cal.State Bar J.166167.)[20]

Loss at the trial level -- by entry of judgment or final order of dismissal -- is very real to the losing party. Notwithstanding that a subsequent appeal might afford the client a second bite at the apple, a plaintiff's loss of the right to recover and a defendant's sufferance of entry of an adverse judgment are equally real and not imagined, objectively existing conditions which are neither feigned nor merely speculative. (Neel v. Magana, Olney,

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[20] See also Davis v. Krasna (1975) 14 Cal.3d 502, 513-514 [holding that it is uncertainty as to the "fact of damage, rather than its amount, which negatives the existence of a cause of action" and that although a right to recover nominal damages will not trigger the statute of limitations, "the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period"].

Levy, Cathcart & Gelfand, supra 6 Cal.3d at p. 183 [approving Hays v. Ewing, supra, 70 Cal. 127, insofar as it accepted as "the date upon which the client suffered damage" the date on which the client's action was dismissed]; see also Rubinstein v. Barnes (1987) 195 Cal.App.3d 276, 281.) Considered in the proper context where the client has or should have discovered and therefore knows that the loss is the result of the attorney's wrongful act of omission -- there is no policy or practical reason to toll the statute of limitations beyond this date.[21]

First, if the discovery element is

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[21] See also Mallen & Smith, Legal Malpractice, supra, section 18.11, pages 111-112. When an appeal is taken from an adverse judgment, "an injury does not disappear or become suspended because of a more final adjudication of the result is sought."

missing or if the attorney continues to represent the client, the statute is tolled for different reasons. It is only the relatively unusual case where (1) a client knows (or should know) that the trial court loss was caused by the attorney, and (2) the attorney-client relationship is terminated but (3) the client nevertheless fails to file suit against the attorney within the statutory period that limitations will be a bar.

Second the slight inconvenience of filing the malpractice action in those few instances where a subsequent appeal from the underlying judgment might resurrect the client's case is not a sufficient reason to toll indefinitely the time within which suit may be filed when an appeal is pursued. The purpose of the statute would not be served if an attorney is kept in a state of breathless

apprehension while a former client pursues appeals from the trial court, to the Court of Appeal, to the Supreme Court and then, if the client has the money and energy, to the United States Supreme Court, during which time memories fade, witnesses disappear or die, and evidence is lost)Feldman v. Granger (1969) 255 Md.288, 257 A.2d 421,425.)

Robinson v. McGinn, supra, 195 Cal.App.3d at pp. 77-78, suggests that considerations of court congestion should outweigh the public policy underpinnings of section 340.6. We disagree. Visions of judicial gridlock cannot color our perception of legislative intent and the temptation to reach a different result is nil where, as here, we see only the usual

floodgates argument, devoid of substance.[22]

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[22] According to Robinson, the rule we adopt today will "further burden our existing overly crowded court calendars with the filing of potentially meritless lawsuits by [clients] waiting to learn whether they indeed will be suffering irremediable harm." (Id. at p. 77.) First, Robinson mistakenly assumes the continuing viability of "irremediable." Second, Robinson also implicitly assumes a volume of cases in this category that is not apparent from the number of published opinions on this point (or from any other source available to us). Third, Robinson ignores the fact that the same attorney may represent the client on the appeal, thereby tolling the statute for a different reason. 340.6 subd. (a)(2).) Fourth, Robinson fails to consider the possibility that an attorney might stipulate to extend the period of limitations until all appeals are concluded. Fifth, Robinson ignores the fact that since most appeals result in affirmance, deferral of the malpractice action is a postponement, not an avoidance. Like death and taxes, the malpractice suit is inevitable where the appeal is lost or where reversal on

We similarly reject the suggestion that commencement of a malpractice action prior to resolution of an appeal in the underlying case will intrude into the attorney-client relationship or pose a threat of inconsistent judgments. In the face of either concern, the malpractice action can by stayed. (Knight v. Furlow (D.C. 1989) 553 A.2d 1232, 1236 ["The fact that not all of a client's damages are finally ascertainable pending the outcome of an appeal may suggest in some circumstances that trial of the malpractice action should be stayed

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appeal does not make the client whole (e.g. Cooper v. State Bar (1987) 43 Cal.3d 1016, 1030 fn. 8 [delayed resolution of a dispute may in itself cause prejudice].) We are in any event satisfied that the particular policy considerations attendant to section 340.6 differ from the general policies emphasized by Robinson. See also footnoted 23, infra.

pending the appeal; it does not indicate that the client has not been injured earlier"].)

Another problem with a less absolute rule is that it necessarily precludes early resolution of a limitations defense in legal malpractice actions. As the Supreme Court recognized in its test of "appreciable harm" by definition involves a resolution of disputed facts and thereby precludes the use of summary judgment or demurrer to determine the availability of the limitations defense. The case before us proves the point.

By comparison, application of the rule we believe the Legislature intended is simple and certain -- Laird was actually damaged on the day the order of dismissal was entered October 20, 1981. On that date, Laird knew her case had

been dismissed, and also knew that her attorney's negligence was the cause of the dismissal. The period of limitations therefore started running on the date she discharged her attorneys, December 7, 1981. Laird nevertheless waited until May 17, 1983, to file suit, five months too long. Since these dates are all subject to judicial notice (Evid. Code section 452, subd. (d)), the issue could have been resolved by demurrer or motion for summary judgment in our view, this factor speaks loudly in favor of the rule.

We therefore hold that the concepts of "appreciable harm" and "irremediable" damage did not survive the adoption of section 340.6 and that the "actual injury contemplated by subdivision (a)(1) of section 340.6 is injury which is existing and not feigned or merely speculative, real and not imagined, objectively

verifiable and not dependent upon the subjective description of the injured person. Accordingly, where an attorney's wrongful act or omission occurs in the course of representing a client in litigation and the client suffers an adverse judgment or other final order in the underlying case, the tolling period of subdivision (a)(1) of section 340.6 stops, at the latest as of the date of the adverse judgment or order and without regard to whether an appeal is filed or pursued.

Since no other tolling provision applies to this case, we hold that Laird's action against Post and Winnikoff is barred by limitations and that the attorneys are entitled, as a matter of law, to judgment in their favor. While we doubt that it will comfort Laird, we express our hope that application of the

rule we apply to her case will in the future prevent the prolonged battle she had to fight only to suffer reversal of a verdict in her favor. This case should have been resolved on demurrer.[23]

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[23] We have considered the effect of the rule of this case on Heyer, Budd, Southland, Bell, Robinson and Troche and note that in each case, although our analysis differs, the result would be the same. In Heyer, subdivision (b) of section 340.6 would make the daughters' action timely. In Budd, the statute would run from the date of entry of judgment against Mr. Budd. In Southland, the statute would run from the date of the administrative decision (not the day following the last day to appeal, but the 30-day difference would not have made the action timely). In Bell, the statute would run from the date of the order refusing her husband's application to join in the underlying case as a plaintiff. In Troche, the statute would run from the date Ms. Troche's federal action was dismissed.

And despite our criticism of Robinson's analysis, our result would be the same. In Robinson, all of the attorney's negligence involved advice unrelated to litigation and the dispute reached both the administrative and

DISPOSITION

The judgment is reversed and remanded with directions to enter a new and different judgment, against Laird and in favor of Post and Winnikoff. The parties are to pay their own costs on appeal.

VOGEL, J

We concur:
DEVICH, Acting P.J.
ORTEGA, J.

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judicial tribunals because Mr. Robinson's new attorney sought a writ of mandate from the trial court to compel an administrative determination of Mr. Robinson's employment status. Thus, the first date on which Mr. Robinson's injury became real and objectively verifiable was on July 18, 1980, the date on which the trial court (1) ruled that Mr. Robinson had resigned and (2) ordered the city to hold a hearing to determine Mr. Robinson's right to disability benefits. His malpractice action, filed on April 30, 1980 was therefore timely.

APPENDIX C

ORDER DENYING REHEARING

2/1 B037429 - S021074

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

JERI EMMET LAIRD, Respondent

v.

SIDNEY BLACKER, Appellant

Petition for rehearing DENIED.
Mosk, J. is of the opinion the petition should be granted.
Opinion modified.

(Sgd) Lucas
Chief Justice

Supreme Court, U.S.
FILED
NOV 10 1992
OFFICE OF THE CLERK

(2)

No. 92-666

In The

Supreme Court of the United States

October Term, 1992

JERI EMMET LAIRD,

Petitioner,

v.

SIDNEY G. BLACKER, as Administrator of the Estate of Samuel Z. Winnikoff; Barry J. Post,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived the right to challenge a California statute of limitations on federal constitutional grounds by failing to raise any federal issues until her petition for rehearing was filed in the California Supreme Court, a petition the supreme court summarily denied.

2. Whether petitioner waived the right to challenge a California statute of limitations on the specific federal grounds raised in her petition for writ of certiorari by failing to raise those particular federal questions in the lower court.

3. If petitioner preserved the right to challenge the California statute on federal grounds, whether her petition should be denied on the ground her due process and equal protection arguments are frivolous.

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No. 92-666

In The

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October Term, 1992

JERI EMMET LAIRD,

Petitioner,

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SIDNEY G. BLACKER, as Administrator of the Estate of Samuel Z. Winnikoff; Barry J. Post,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

As discussed more fully below, this Court lacks jurisdiction to consider this case because Petitioner failed to raise any federal questions until her petition for rehearing to the California Supreme Court; the California Supreme Court never entertained or decided any of Petitioner's federal questions; Petitioner could not reasonably have been surprised by the decision of the California Supreme Court thereby excusing her failure to raise the issues earlier; and, with one exception, Petitioner raises entirely new federal questions in her Petition to this Court.

STATEMENT OF THE CASE

The sole issue presented to the state courts in this case was the proper construction of California Code of Civil Procedure section 340.6, the statute of limitations which governs legal malpractice suits. Section 340.6 provides the one-year statute of limitations on such actions commences to run when (1) the client discovers, or should have discovered, that his attorney was negligent, (2) the client suffers "actual injury" as a result of the negligence, and (3) the attorney-client relationship is severed. Here, Petitioner discovered her attorneys' alleged negligence and terminated her relationship with them more than one year before filing suit. The issue below was whether she suffered "actual" injury when, also over a year before her suit was filed, the lawsuit she had retained her attorneys to prosecute was dismissed, the dismissal being the basis for her malpractice claim. The California Supreme Court held the dismissal of Petitioner's suit was an "actual injury" sufficient to trigger the statute of limitations. It rejected Laird's claim that she suffered no actual harm until she abandoned her appeal of the dismissal less than a year before suing her attorneys.

The California Supreme Court's decision was based on the legislative history of section 340.6 as well as prior decisions of the court defining the term "actual injury" in the context of legal malpractice suits. Petitioner did not raise, and the California Supreme Court did not discuss, any state or federal constitutional issues. In her petition for rehearing to the California Supreme Court, Petitioner for the first time alluded to the argument that section 340.6 or the lower court's interpretation of it violated the

United States Constitution. The supreme court summarily denied the petition. App. C. at 146.[1]

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner Failed To Timely Raise, And The State Court Never Entertained And Decided, Petitioner's Federal Questions Despite Petitioner's Ability To Anticipate The State Court's Bases Of Decision.

Petitioner concedes she raised her federal questions *for the first time* in her petition for rehearing to the California Supreme Court. Petition for a Writ of Certiorari to the California Supreme Court ("Petn.") at 7. The California Supreme Court summarily denied the petition for rehearing without discussing the federal questions. App. C at 146.

"The long established general rule is that an attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the [state] court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). *See Estate of Wilson v. Aiken Indust.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring in the denial of the petition for a writ of certiorari); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.21(c), at 155-56 (6th ed. 1986); *see also Yee v. City of Escondido, Cal.*, ___ U.S. ___, 112 S.Ct. 1522, 1531 (1992) (Court refused to decide due process issue raised for the first time in a petition for review to the California

[1] "App." refers to an appendix to the Petition.

Supreme Court, which declined discretionary review). Without doubt, the California Supreme Court did *not* entertain and decide any federal questions in its one-sentence denial of the petition for rehearing.

Petitioner argues she falls within an exception to the rule barring consideration of the federal questions raised for the first time in a petition for rehearing because the federal questions were created by an unanticipated decision of the highest state court, and the petition for rehearing therefore presented the first opportunity to raise the federal question. Petn. at 7; *Herndon*, 295 U.S. at 443-44; Stern et al., *supra*, at 156. This argument is without merit.

The California Supreme Court *affirmed* the decision of the California Court of Appeal and *adopted* the court of appeal's interpretation of California Code of Civil Procedure section 340.6. Although the outcome of the case in the California Supreme Court was not foreordained, the decision hardly contained the "enormous element of surprise" contended by Petitioner. Petn. at 7. Based upon the California Court of Appeal decision in this case, Petitioner reasonably could have anticipated the California Supreme Court would adopt the court of appeal's rationale. Petitioner therefore *could have raised* the federal questions in the briefs she filed in the California Supreme Court, rather than raising these issues for the first time in her petition for rehearing.

This case is similar to *Herndon*, where this Court held that the appellant was bound to anticipate the interpretation given a statute by the Georgia Supreme Court because that court decided another case a few months

earlier construing the same statute. *Herndon*, 295 U.S. at 445-46.

> Appellant, of course, cannot plead ignorance of the [earlier] ruling . . . , and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below.

Id. at 446.

Like the earlier Georgia Supreme Court decision in *Herndon*, the decision of the California Court of Appeal in this case put Petitioner on notice that the case could be decided on identical grounds by the California Supreme Court. Without an element of surprise, Petitioner has no excuse for failing to raise the federal questions earlier than in the petition for rehearing. For this reason alone, this Court should deny the petition for certiorari, as this Court did with the petition in *Herndon*.

II. Even If Petitioner Timely Raised Federal Questions In Her Petition For Rehearing To The California Supreme Court (She Did Not) And This Court Ignores The California Supreme Court's Failure To Entertain Or Decide The Federal Questions (It Should Not), This Court Should Deny The Writ Of Certiorari Because Petitioner Raised *Different* Federal Questions In Her Petition.

Petitioner raises four claims in her petition to this Court: the state statute at issue is vague and overbroad in violation of the due process clause of the Fourteenth Amendment; the statute violates the equal protection clause of the Fourteenth Amendment because it singles

out for discriminatory treatment victims of legal malpractice; the California Supreme Court's retroactive interpretation of the statute violates the due process clause of the Fourteenth Amendment; and the California Supreme Court's interpretation of the statute constitutes a taking of property without due process of law in violation of the Fourteenth Amendment.

Of these claims, only the second claim, for equal protection, was alluded to in the petition for rehearing.[2] Although Petitioner raised a claim under the due process clause of the Fourteenth Amendment, the claim did not involve vagueness, overbreadth, retroactivity, or an

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[2] Petitioner made a three sentence equal protection argument in her petition for rehearing to the California Supreme Court. Although Petitioner failed to include the petition for rehearing in an appendix to her petition to this court, the entirety of her equal protection argument (excluding footnotes) reads:

> **2. The statute of repose violates the equal protection provision of the federal constitution.**
>
> Appellant is entitled to the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States. Although an individual injured by an attorney need [sic] protection, the fortuitous timing of the injury classifies the individual as to whether or not he will be allowed to pursue a remedy.
>
> The U.S. Supreme Court in *Reed v. Reed* (1971) stated the test for a statute which accorded different treatment to persons by placing them in classes.

Plaintiff and Respondent Jeri Emmet Laird's Petition for Rehearing after a Decision by the California Supreme Court filed May 22, 1992 ("Petn. for Rehearing") at 21.

unconstitutional taking. Instead, Petitioner, citing *Wilson v. Iseminger*, 185 U.S. 55 (1902), argued that section 340.6 violates the due process clause because in some circumstances it fails to provide a reasonable time in which to bring a cause of action.[3] *See id.* at 62-64.

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[3] After citing the text of the Fourteenth Amendment, Petitioner's due process argument, in its entirety, was as follows:

> Appellant is entitled to the due process guarantees of Section 1 of the Fourteenth Amendment of the Constitution of the United States. The due process aspects of statutes of limitations were reviewed by the U.S. Supreme Court in *Wilson v. Iseminger*, 185 U.S. 55, 22 S. Ct. 573 (1902). The court at page 575 stated:
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> > . . . it may be properly conceded that all statute [sic] of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to dos, [sic] it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. . . .
>
> The statutory language (deprivation of "rights, privileges, or immunities secured by the Constitution or laws") covers deprivations of Fourteenth Amendment rights. *Monroe v. Paper* [sic] (1961) 365 U.S. 167, 81 S.Ct. 473, 475, 5 L.Ed.2d 492, 496.
>
> The following are significant rights and liberties held to be fundamental and therefore within the protection of the Due Process Clause: the right to acquire, enjoy, own and dispose of property. *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617.

It is not enough that Petitioner raised *a* due process argument in the state court below. Instead, Petitioner must raise *the same* due process argument. In *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court refused to consider a due process argument raised for the first time in the Supreme Court, despite the fact that the petitioner in the state court below raised a different due process challenge. *Id.* at 75 n.1, 77-80; *see also G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982) (Court refused to consider due process argument even though Petitioner raised a different due process argument in federal court of appeals); *but see Bankers Life and Casualty*, 486 U.S. at 86-87 (O'Connor, J., concurring in part and concurring in the judgment) (because petitioner invoked a due process argument below, the Court should examine the argument to determine if it is "only an enlargement" of the argument raised below).[4]

> Section 340.6 does not provide a "reasonable time" for the commencement of an action by a consumer who is injured one day before the period ends, nor does it provide a reasonable time for appellant who was injured after the period had run. In fact, the statutes [sic] does not only *limit* the time to bring an action, but also *removes the remedy* of injured parties such as the appellant. The result is an unlawful attempt to extinguish rights arbitrarily, thereby violating the constitutional protection of due process of law.

Petn. for Rehearing at 20-21.

[4] Even under Justice O'Connor's standard, the vagueness, overbreadth, retroactivity, and takings arguments are not merely "enlargements" of the argument raised below that the statute in question violated due process because it failed to provide a reasonable time in which to bring a cause of action.

Thus, Petitioner's equal protection argument remains the only federal question raised below (even then, it was raised at the very last moment) *and* appearing in the questions presented. This Court, at minimum, should refuse to consider the other arguments raised in the petition.

III. This Court Should Deny The Writ Because Petitioner's Federal Questions Are Frivolous.

A. There Is No Merit To Petitioner's Contention That California Code Of Civil Procedure Section 340.6 Is Vague Or Overbroad.

California Code of Civil Procedure section 340.6 provides that the statute of limitations on a client's legal malpractice suit does not begin running until the client suffers "actual injury" as a result of the attorney's wrongful act. In her first question presented, Petitioner contends section 340.6 violates the due process clause of the Fourteenth Amendment on the grounds of vagueness or overbreadth because it is unclear whether the words "actual injury" refer to "appreciable injury" or "irremediable injury." Petitioner's due process challenge fails because it ignores the governing rule that in analyzing a facial challenge to a state statute, this Court will consider not only the language of the statute itself but also the construction of the statute adopted by state courts. If the statute as construed by court decisions is clear, it passes constitutional muster. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (Marshall, J., for a unanimous Court) ("In evaluating a facial challenge to a state law, a federal court must, of

course, consider any limiting construction that a state court or enforcement agency has proffered"); *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973) ("For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it' ").

Given the manner in which the term "actual injury" has been defined in California decisions, including this case, Petitioner's contention that the language is ambiguous, and that it is unclear whether the term refers to injury which must be "irremediable," is without merit.[5]

In its present opinion, the California Supreme Court expressly rejected Petitioner's contention that the term "actual injury" could be construed to mean "irremediable injury." The court ruled:

> [Petitioner] contends that several Court of Appeal cases support her assertion that the negligence caused by the malpractice must be "irremediable" before the statute of limitations under section 340.6 will begin to run. . . . [] Her position is unpersuasive.

App. A at 35.

The court went on to note that the court of appeal in the instant case had properly criticized prior cases "for relying on the 'irremediable damage' rule rejected by the

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[5] Petitioner's overbreadth challenge, which she supports with neither argument nor citations to applicable cases, must fail because she has not alleged section 340.6 reaches any constitutionally protected conduct. *See Village of Hoffman Estates*, 455 U.S. at 494. Thus, we discuss only her vagueness argument.

Legislature when it adopted section 340.6." *Id.* at 41-42. Finally, the court explained that its interpretation of the term "actual injury" "is based on the Legislature's rejection of the 'irremediable damage' rule of *Heyer v. Flaig, supra,* 70 Cal.2d 223. . . . " App. A at 54.[6] In light of the foregoing language, Petitioner's contention that section 340.6 is impermissibly vague and that it is not clear whether an injury must be "irremediable" before the statute of limitations commences to run is frivolous.

Nor is there merit to the argument that the term "actual injury" is unconstitutionally vague because the court never defined that term. Petn. at 16. As Petitioner acknowledges, when the California Legislature enacted section 340.6, it codified the existing tolling rules on legal malpractice suits which the California Supreme Court had adopted in *Budd v. Nixen,* 6 Cal. 3d 195 (1971) and *Neel v. Magana,* 6 Cal. 3d 176 (1971), including the rule that the statute of limitations on legal malpractice suits is tolled until the client suffers "actual injury." Petn. at 18-19, citing CALIFORNIA SENATE COMMISSION ON JUDICIARY REPORT (May 17, 1977); App. A at 19-20. In *Budd v. Nixen,* 6 Cal. 3d at 201, the court made clear that when it used the phrase "actual injury," it meant "[a]ny appreciable and actual harm flowing from the attorney's negligent conduct. . . . " *Id.* For example, the court explained that a client suffers "actual" injury if he incurs unnecessary fees

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[6] The court's ruling that an injury need not be "irremediable" under the statute led it to conclude that an appeal does not toll the time in which to file an action for legal malpractice. App. A at 35-36.

or expenses during the course of a trial as a result of an attorney's misconduct. *Id.* at 201-02.

In the present case, the California Supreme Court reaffirmed its earlier holding in *Budd*, ruling that when the legislature enacted section 340.6, it "used the term 'actual' to focus on the *fact* that damage occurred, and eliminated all qualifiers to prevent confusion that would arise by requiring courts to consider the total amount of damages." App. A at 28 (emphasis added).

Both on its face and as defined in this and prior cases, the term "actual injury" is sufficiently clear and self-explanatory to satisfy due process requirements.

B. Petitioner's Equal Protection Argument Is Without Merit.

In her second question presented, Petitioner argues section 340.6, which tolls the time period in which to bring a legal malpractice action until plaintiff has suffered an "actual injury," deprives litigants in legal malpractice cases of equal protection of the laws under the Fourteenth Amendment because lawsuits against other professionals are tolled until the plaintiff suffers "irremediable injury." Petitioner's argument is without merit.

As a factual matter, Petitioner is wrong when she asserts that legal malpractice suits are treated differently from other tort suits under California law. Whether governed by common law or statute, the statutes of limitation on tort suits in California generally commence running once the plaintiff has notice of the defendant's misconduct and suffers actual injury as a proximate result. *See,*

e.g., *Budd*, 6 Cal. 3d at 200; CAL. CIV. PROC. CODE § 340.5 (West 1982) ("In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first".) Indeed it is hornbook law that an action for general negligence requires actual loss or damage and that "the statute of limitations is generally held not to begin to run against a negligence action until *some* damage has occurred." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 30, at 165 (5th ed. 1984) (emphasis added).

We are not aware of any statute of limitation, and Petitioner has not cited one, which requires "irremediable" injury before the limitations period begins to run. To the contrary, irremediable injury generally is *not* a requirement of most tort suits. For example, pursuant to section 340.5, the limitations period which governs medical malpractice suits begins running once the plaintiff has been injured even if the plaintiff's injury can be corrected or cured by later treatment, i.e., even though the plaintiff's injury is not "irremediable."

Even if Petitioner's claim that section 340.6 imposed more stringent time limits on legal malpractice suits were correct, Petitioner's contention that the disparate treatment of legal malpractice plaintiffs constitutes a violation of equal protection fails because an equal protection challenge must be evaluated under "rational basis" review

and the statute of limitation at issue here easily meets that standard.[7]

In *G.D. Searle & Company*, 455 U.S. 404, the petitioner, a foreign corporation sued in a products liability action, argued a New Jersey statute which tolls the period for an action against a foreign corporation that is amenable to jurisdiction in New Jersey courts but that has no person or officer in New Jersey upon whom process may be served violated the equal protection clause of the Fourteenth Amendment. *Id.* at 405. Had the petitioner been a New Jersey corporation, the suit against it would have been barred by the statute of limitations. In rejecting Petitioner's equal protection argument, this Court first set out the applicable standard to review this type of equal protection challenge:

> In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends. *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981). The New Jersey tolling provision need satisfy only this constitutional minimum. As this court explained in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed 1628 (1945):
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> > "[Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is

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[7] Petitioner fails to cite a single federal case setting out the standard of review applicable to equal protection claims.

> now called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to relatively large degree of legislative control."

G.D. Searle & Co., 455 U.S. at 408.

Applying this standard in *G.D. Searle*, the Court found a number of rational reasons supporting tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. *Id.* at 410. For example, the Court recognized that unrepresented foreign corporations remain potentially difficult to locate. *Id.*

Similarly, in *Montagino v. Canale*, 792 F.2d 554, 557 (5th Cir. 1986), the Fifth Circuit, applying rational basis scrutiny, rejected an equal protection challenge to a Louisiana statute of limitations which differentiated Louisiana medical malpractice victims and ordinary tort victims. The Court noted that the Louisiana statute was enacted to alleviate "the insurance crisis by reducing malpractice claims, thereby reducing medical malpractice insurance rates, resulting in health care being more accessible to patients at reasonable costs." *Id*, quoting *Valentine v. Thomas*, 433 So.2d 289, 292 (La. App. 1983).

In the present case, as in *Montagino*, a state legislature enacted a statute with the express goal of reducing the cost of malpractice insurance and making such insurance easier to obtain. California Senate Commission on Judiciary, Fact Sheet on Legal Malpractice: Statute of

LIMITATIONS – AB 298 (March 25, 1977). Applying the "rational basis" standard to the instant case, it is clear that the California Legislature rationally could have adopted a stricter legal malpractice statute of limitations in order to alleviate the malpractice burden on lawyers and insurers, and ultimately, clients.

Because this Court would review Petitioner's equal protection challenge under the rational basis test, and the California Legislature clearly had a rational basis for limiting legal malpractice claims, Petitioner's equal protection argument is insubstantial. It does not provide a reason for granting the petition.

C. The Retroactivity Of The California Supreme Court Decision Does Not Impinge Upon Petitioner's Due Process Rights.

In her third question presented, Petitioner argues the California Supreme Court's decision to apply its interpretation of section 340.6 retroactively violated her due process rights under the Fourteenth Amendment. The California Supreme Court rejected Petitioner's argument that retroactive application of its decision violated *state* law. App. A at 52-55.[8] In rejecting Petitioner's argument, the California Supreme Court noted that its decision was in accordance with the legislative history of section 340.6

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[8] As noted in Section II, *supra*, Petitioner did not raise and the California Supreme Court never entertained or decided any argument that retroactive application of the decision violated *federal* law.

and with the manner in which the statute had been applied by prior cases.

> Our application of these cases to the facts before us does not, therefore, represent a departure from generally accepted principles. We conclude that there is no compelling reason in this case to depart from the general rule of retroactive application of judicial decisions.

Id. at 54.

Petitioner now claims that the United States Constitution is violated by retroactive application of the California Supreme Court interpretation of section 340.6. Petitioner's federal claim is based on the same faulty premise which underlay her state claim – that the California Supreme Court changed the law. As that court correctly observed, its decision did not represent a departure from established law. Prior decision had uniformly ruled that legal malpractice actions accrued when an adverse judgment was entered and that the statute of limitations was not tolled by an appeal. *See Budd v. Nixen*, 6 Cal. 3d at 202; *Neel v. Magana*, 6 Cal. 3d at 183; *Degarmo v. Luther T. Mayo, Inc.*, 4 Cal. App. 2d 604, 606 (1935). No California court had ever reached a contrary result. While several courts had mistakenly used the term "irremediable" to describe the type of injury a client must suffer before a cause of action accrued, no court had ever construed the term "irremediable" to mean that the underlying case was no longer subject to appeal, the construction advocated by Petitioner. Thus, the California Supreme Court decision therefore did not represent a departure from past law.

Petitioner's federal retroactivity argument fails for the additional reason that where a case involves an issue of state law, the state courts have wide discretion to determine the retroactivity of their own decisions. *See Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932); *American Trucking Ass'n v. Smith*, ___ U.S. ___, 110 S.Ct. 2323, 2330 (1990).

D. The California Supreme Court Decision Is Not An Unconstitutional Taking In Violation Of The Fourteenth Amendment.

In her final question presented, Petitioner argues the California Supreme Court's conclusion her action against her attorneys was barred by the statute of limitations constitutes a taking of property without due process of law in violation of the Fourteenth Amendment. Petitioner's argument lacks merit.

Petitioner's argument, although styled as a "takings" claim, is merely another challenge to the correctness of the California Supreme Court's interpretation of section 340.6. *See* Petn. at 46-47 ("The *Laird* court, in direct contradiction to the language of section 340.6, wrongfully subsumes the actual-injury inquiry into the separate question of when the client discovered or should have discovered the alleged negligence"). Petitioner has failed to cite a single case supporting the proposition that an adverse decision of a state court, even if wrong, constitutes the "taking" of property in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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